Ong Kong Beng & Anor v Ong Kong Leong & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-1673–09 OF 2016
HANIPAH FARIKULLAH, NANTHA BALAN AND DARRYL GOON JJCA
25 MARCH 2021

Trusts and Trustees — Lands — Whether lands were held on trust — Patriarch of large traditional Chinese family claimed lands he had transferred to four of his ten sons were held by them on trust for the benefit of all his sons — Whether lands were actually outright gifts to his four sons — Whether factual matrix of case supported existence of a trust — Whether elements necessary in law to constitute a trust had been satisfied — Whether testimonies of all the witnesses taken against the contemporary documents, the conduct of the parties and the overall probabilities of the case supported the existence of a trust

The appellants, the first respondent and another brother named Ong Kwong Yew ('OKY') were the sons of a businessman ('Ong Sr') from his first wife whilst the third and fourth respondents were Ong Sr's sons from his second wife. The second respondent was the widow of Ong Sr's eldest son ('Heyan') from his first wife. All in, Ong Sr had 14 children, ten of whom were males. Sometime in 1980, Ong Sr transferred part of his 8/20 undivided share in a piece of land ('the original land') to the appellants, Heyan and OKY for 'love and affection'. The transferees (except Heyan, who had since died) were to subsequently claim that the transfer was an outright gift to reward them for developing the family business. But Ong Sr was to deny that contention and claim that he had told the transferees that they were to hold the lands on trust for the equal benefit of all his sons because at the time of the transfer the first, third and fourth respondents were still minors. In December 1998, the appellants, OKY and some of the other co-owners (non-family members) of the original land entered into an agreement ('the subdivision agreement') to subdivide their respective portions of the original land. The subdivision resulted in the appellants and OKY being registered as owners of their respective portions of the original land complete with individual titles — Parcel 1 was registered in OKY's name, Parcel 2 in the second appellant's name and Parcel 3 in the name of the first appellant ('D1'). Sometime in 2013, ie, about 33 years after the 1980 transfer, Ong Sr sued the appellants and OKY in Writ No 23NCVC-31–11 of 2013 ('Suit 31') to recover parcels one, two and three from them claiming that they held those lands on trust for him as the absolute beneficial owner thereof. This was despite Ong Sr having witnessed the signing of the subdivision agreement (wherein the appellants and OKY were described

as the legal and beneficial owners of their portions of the lands) and not raising any objections to the said agreement. Since it was a family dispute, the High Court judge conducted a mediation to resolve Suit 31. The mediation resulted in the recording of a consent judgment pursuant to which Parcel 1 was sold and 60% from the proceeds of sale was given to Ong Sr while the balance was distributed equally amongst all his sons including the estate of his deceased son, Heyan. As for Parcels 2 and 3, Ong Sr relinquished any right or claim to them. He later claimed that he did so because D1 had given an undertaking during the mediation that he would sell both those parcels and distribute the proceeds equally amongst Ong Sr's ten sons ('the undertaking'). Less than three months after the consent judgment, the respondents filed Suit No 22NCVC-497–10 of 2014 ('Suit 497') (the suit from which the instant appeal emanated) against the appellants on D1's failure to carry out the undertaking. The respondents sought a declaration that the appellants held Parcels 2 and 3 on trust for the equal benefit of all of Ong Sr's sons. An order was sought for the lands to be sold and for one-tenth of the proceeds of sale to be given to each respondent. The respondents argued that the existence of a trust was consistent with Ong Sr's intention and practice at all times that his sons should have an equal share in the lands, assets and businesses owned by the Ong family. The appellants denied the trust and said no declaration of trust was communicated to them verbally by Ong Sr at the time of the 1980 transfer. The appellants further contended that they had at all times dealt freely with their respective lands as the absolute owners thereof and had used their own funds to subdivide the original land and to pay the quit rent and other rates attached to their lands as well as the income tax on revenue generated from the lands. Following a trial, the High Court found for the respondents and ordered the lands to be sold and the proceeds of sale to be divided equally amongst Ong Sr's sons. D1 was also ordered to pay RM30,000 in damages to the respondents and both the appellants were ordered to pay RM50,000 as costs to the respondents. Since a stay of execution of the decision pending appeal was denied, Parcels 2 and 3 were sold and the proceeds of sale were distributed as ordered by the trial court.

Held, unanimously allowing the appeal; setting aside the High Court's decision; dismissing the respondents' claim; and ordering all monies that were paid to the respondents pursuant to the High Court's order, including all damages and costs, to be repaid to the appellants:

(1) The three elements necessary to constitute a trust in law were certainty of intention, certainty of object and certainty of subject matter. In the instant case, there was no document evidencing a trust, nor any registration of a trust pursuant to s 344 of the National Land Code (see paras 154–155).

(2) The trial judge believed and relied heavily on Ong Sr's evidence that it was his intention that the lands be shared by all his ten sons. But mere intention alone was insufficient to create a valid trust. The judge also

relied on the evidence of Ong Sr's lawyer, PW2 (but that was only in relation to what transpired during the mediation in Suit 31), the evidence of Ong Sr's second wife, PW3 (who was someone who clearly had an interest in the outcome of the case) and the evidence of the first respondent, PW6 (but PW6 acknowledged during cross-examination that he had no knowledge of any trust over the land and merely said that it was always Ong Sr's intention that the assets of the family's companies, its shares and lands were all to be shared equally by his sons). The evidence at the trial of Suit 497 as a whole was equivocal and did not establish that the appellants held the lands on trust for the sons of Ong Sr especially in the light of the contemporaneous documents including the subdivision agreement, the consent judgment in Suit 31 and Ong Sr's conduct, in particular his answers on various aspects of the claim that there was a trust over the lands. The trial judge placed too much emphasis on the plausibility of Ong Sr's evidence when what he ought to have done was to test Ong Sr's testimony against the contemporaneous documents, the conduct of the parties and the overall probabilities of the case (see paras 160–163 & 187).

(3) There was no evidence that when he transferred the lands to the appellants in 1980, Ong Sr made any declaration of trust, ie, that he told the appellants at the time of the transfer that the lands were to be held on trust for the benefit of all his sons. Ong Sr's acts and omissions, both express and by inference, over a substantial period of almost 33 years in fact showed that the lands were, and were meant to be, gifted absolutely to the appellants (see paras 193 & 199).

(4) It was the respondents' burden to prove that Ong Sr at the time of the 1980 transfer had uttered clear, unequivocal and irrevocable words to the appellants which were necessary to create a trust on the original land. The evidence instead showed Ong Sr as saying that 'so long as I was alive, the lands would be held by me absolutely and any transfers to my sons would only have taken place after my death'. The appellants rightly described this as a testamentary disposition which did not fulfill the requirements of s 5 of the Wills Act 1959. In any event, it was inconsistent with the creation of an inter vivos trust. It was therefore clear that there was no certainty of words and no declaration of a trust (see paras 190–191).

(5) The evidence at the trial did not establish, on balance of probabilities, that the appellants held the lands on trust for the sons of Ong Sr. The trial judge's approach was erroneous, his reasoning flawed and his conclusions wrong because he failed to deal convincingly or at all with the following critical matters: (a) Ong Sr's failure to explain the delay (after 33 years) in asserting in Suit 31 that the lands registered in the names of the appellants were held on trust for him; (b) Ong Sr's failure to explain the inconsistency between asserting in Suit 31 that the lands were held on

A trust for him as the absolute beneficial owner thereof and the contention by the respondents and Ong Sr in Suit 497 that the lands were held by the appellants on trust for all the sons of Ong Sr; (c) that if the appellants did renege on their undertaking as pleaded by the respondents in Suit 497, then it was Ong Sr (and not the respondents) who should have
B prosecuted the claim against the appellants. But Ong Sr never took any action against the appellants for not selling Parcels 2 and 3 as per the discussion or declaration made by D1 during the mediation; (d) Ong Sr took no steps to set aside the consent judgment; (e) Ong Sr's evidence that so long as he was alive, the lands were to be held by him absolutely
C and that after his death, they were to be distributed equally amongst his sons was akin to a testamentary disposition contrary to s 5 of the Wills Act 1959 and was inconsistent with the creation of an inter vivos trust; (f) Ong Sr's conduct in witnessing the subdivision agreement and thereby acquiescing to its contents which referred to the appellants as the
D owners of the lands which were the subject matter of the subdivision; (g) Ong Sr's allegation that he objected to the subdivision agreement by verbally informing the consultant, Lim Kooi Wah, of the same, but the latter was never called to testify at the trial; (h) Ong Sr's conduct in claiming that he could not communicate his objections to the
E subdivision agreement to the appellants and OKY as he had quarreled with them when there was no evidence of any such quarrel; (i) D1's conduct in making all the payments to the consultants for the subdivision of the land and the lack of any evidence of payment or reimbursement made by Ong Sr or by the family companies; (j) the fact that by the terms
F of the consent judgment in Suit 31, Ong Sr had unequivocally and irrevocably relinquished all rights, interest or claim to Parcels 2 and 3; (k) that Ong Sr's claim that he transferred the original land in 1980 to the four sons (including the appellants) because the others were too young at the time did not make sense because by the time the original land was
G sub-divided in December 1998, the others had attained the age of majority, yet no attempt was made to transfer any part of the original lands to them; (l) Ong Sr's failure to explain why it was necessary to transfer the original land in 1980 into the names of four sons when one alone would have sufficed; (m) Ong Sr's failure to provide any evidence
H that he was 'cheated' by D1; (n) Ong Sr's admission that the appellants had paid the income tax on the produce that was generated from the lands. If the lands were trust property, the tax should have been paid by Ong Sr or by the family companies. But that did not happen. This was conduct that demonstrated that the lands belonged to the appellants as
I the legal and beneficial owners thereof; (o) that no trust was registered over the lands pursuant to s 344 of the National Land Code; and (p) that Ong Sr's conduct in asking for and accepting 60% of the proceeds of sale of Parcel 1 (per the consent judgment) showed that Parcel 1, and by extension Parcels 2 and 3, were not held on trust (see paras 195–196).

(6) A demonstrable misunderstanding of relevant evidence and a demonstrable failure to consider relevant evidence rendered the trial judge's decision that there was a trust over the disputed lands plainly wrong as no reasonable tribunal considering all the evidence and materials that were placed before the trial court would have come to that conclusion (see paras 197 & 201–202).

[Bahasa Malaysia summary

Perayu-perayu, responden pertama dan seorang lagi abang bernama Ong Kwong Yew ('OKY') merupakan anak kepada seorang ahli perniagaan ('Ong Sr') daripada isteri pertamanya manakala responden ketiga dan keempat adalah anak lelaki Ong Sr daripada isteri keduanya. Responden kedua adalah balu kepada anak sulung Ong Sr ('Heyan') daripada isteri pertamanya. Ong Sr mempunyai 14 anak kesemuanya, sepuluh daripadanya adalah lelaki. Pada tahun 1980, Ong Sr memindahkan sebahagian 8/20 di dalam sebidang tanah ('tanah asal') kepada perayu-perayu, Heyan dan OKY atas dasar 'kasih sayang'. Penerima hartanah (kecuali Heyan, yang telah meninggal dunia) kemudiannya mendakwa bahawa pemindahan tersebut adalah ganjaran kepada mereka kerana membangunkan perniagaan keluarga. Tetapi Ong Sr menafikan perkara tersebut dan mendakwa bahawa dia telah memberitahu penerima hartanah tersebut bahawa mereka merupakan pemegang amanah untuk kepentingan semua anak-anaknya kerana pada masa pemindahan tersebut, responden pertama, ketiga dan keempat masih di bawah umur. Pada bulan Disember 1998, perayu, OKY dan beberapa pemilik bersama lain (bukan ahli keluarga) tanah asal memeterai perjanjian ('perjanjian pembahagian') untuk membahagikan bahagian tanah asal masing-masing. Pembahagian tersebut menyebabkan perayu dan OKY didaftarkan sebagai pemilik bahagian masing-masing tanah asal yang lengkap dengan hakmilik individu — parsel satu didaftarkan atas nama OKY, parsel dua atas nama perayu kedua dan parsel tiga atas nama perayu pertama ('D1'). Sekitar tahun 2013, iaitu, 33 tahun selepas pemindahan pada tahun 1980, Ong Sr menyaman perayu dan OKY dalam Guaman No 23NCVC-31–11 of 2013 ('Guaman 31') untuk mendapatkan semula parsel satu, dua dan tiga atas alasan bahawa mereka memegang tanah-tanah itu atas pemegang amanah untuknya sebagai pemilik mutlaknya. Walaupun Ong Sr telah menyaksikan pemeteraian perjanjian pembahagian (di mana perayu dan OKY sebagai pemilik sah dan benefisial bahagian tanah mereka) dan tidak menimbulkan sebarang bantahan terhadap perjanjian tersebut. Oleh kerana ia adalah pertikaian keluarga, hakim Mahkamah Tinggi menjalankan mediasi untuk menyelesaikan Guaman 31. Mediasi tersebut berjaya memeterai penghakiman persetujuan yang mana parsel satu dijual dan 60% daripada hasil jualan diberikan kepada Ong Sr manakala bakinya diagihkan sama rata di kalangan semua anak lelakinya termasuk harta pusaka anaknya yang meninggal dunia, Heyan. Bagi parsel dua dan tiga, Ong Sr melepaskan haknya atau tuntutan kepada mereka. Dia kemudian meenghujahkan bahawa dia berbuat demikian kerana D1 telah

memberikan akujanji semasa mediasi bahawa dia akan menjual kedua-dua parsel tersebut dan mengagihkan hasilnya sama rata di kalangan sepuluh anak lelaki Ong Sr ('akujanji tersebut'). Kurang daripada tiga bulan selepas penghakiman persetujuan, responden memfailkan Guaman No 22NCVC-497–10 of 2014 ('Guaman 497') (guaman berkenaan rayuan ini) terhadap perayu atas kegagalan D1 untuk melaksanakan akujanji tersebut. Responden memohon perisytiharan bahawa perayu memegang parsel dua dan tiga atas kepercayaan untuk kepentingan sama rata semua anak lelaki Ong Sr. Perintah telah dipohon agar hartanah tersebut dijual dan untuk satu persepuluh daripada hasil jualan yang akan diberikan kepada setiap responden. Responden-responden menghujahkan bahawa kewujudan amanah tersebut adalah konsisten dengan niat dan perbuatan Ong Sr pada setiap masa material bahawa anak-anaknya harus mempunyai bahagian yang sama dalam tanah, aset dan perniagaan yang dimiliki oleh keluarga Ong. Perayu menafikan kepercayaan itu dan berkata tiada pengisytiharan kepercayaan disampaikan kepada mereka secara lisan oleh Ong Sr pada masa pemindahan 1980. Perayu-perayu juga menghujahkan bahawa mereka pada setiap masa telah berurusan dengan bebas dengan tanah masing-masing sebagai pemilik mutlaknya dan telah menggunakan dana mereka sendiri untuk membahagikan tanah asal dan membayar cukai tanah dan membayar cukai tanah dan kadar lain yang dilampirkan pada tanah mereka serta cukai pendapatan ke atas hasil yang dijana daripada tanah-tanah tersebut. Selepas perbicaraan, Mahkamah Tinggi menyebelahi responden-responden dan memerintahkan tanah-tanah tersebut dijual dan hasil jualan dibahagikan sama rata antara anak-anak Ong Sr. D1 juga diperintahkan membayar ganti rugi RM30,000 kepada responden dan kedua-dua perayu diperintahkan membayar RM50,000 sebagai kos kepada responden. Oleh kerana penangguhan pelaksanaan keputusan sementara menunggu rayuan ditolak, parsel dua dan tiga telah dijual dan hasil jualan dibahagikan seperti yang diperintahkan oleh mahkamah.

Diputuskan, sebulat suara membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi, menolak tuntutan responden-responden; dan memerintahkan semua wang yang dibayar berdasarkan perintah Mahkamah Tinggi, termasuk semua tuntutan ganti rugi dan kos, dibayar semula kepada perayu-perayu:

(1) Tiga elemen yang diperlukan untuk membentuk amanah menurut undang-undang adalah kepastian niat, kepastian objek dan kepastian perkara asas. Dalam kes ini, tiada dokumen yang membuktikan amanah tersebut wujud, atau pendaftaran pemegang amanah menurut s 344 Kanun Tanah Negara (lihat perenggan 154–155).

(2) Hakim bicara bergantung pada keterangan Ong Sr bahawa adalah niatnya agar tanah tersebut dikongsi oleh kesemua sepuluh anak lelakinya. Tetapi niat semata-mata sahaja tidak mencukupi untuk mewujudkan amanah. Hakim juga bergantung kepada keterangan

peguam Ong Sr, PW2 (tetapi perkara tersebut hanya berkaitan dengan perkara yang berlaku semasa mediasi di dalam Guaman 31), keterangan isteri kedua Ong Sr, PW3 (yang merupakan seseorang yang jelas mempunyai kepentingan di dalam kes tersebut) dan keterangan responden pertama, PW6 (tetapi PW6 mengakui semasa pemeriksaan balas bahawa dia tidak mempunyai pengetahuan tentang amanah ke atas tanah tersebut dan hanya berkata niat Ong Sr adalah aset syarikat keluarga, saham dan tanahnya semuanya akan dikongsi sama rata oleh anak-anaknya). Bukti pada perbicaraan Guaman 497 secara keseluruhan adalah sama dan tidak membuktikan bahawa perayu memegang tanah-tanah tersebut atas kepercayaan untuk anak-anak Ong Sr terutamanya berdasarkan dokumen-dokumen termasuk perjanjian sub-divisi, penghakiman persetujuan dalam Guaman 31 dan perbuatan Ong Sr, khususnya jawapannya mengenai pelbagai aspek tuntutan bahawa terdapat kepercayaan ke atas tanah-tanah tersebut. Hakim bicara meletakkan terlalu banyak penekanan pada keterangan Ong Sr dan sepatutnya hakim bicara menguji keterangan Ong Sr terhadap dokumen-dokumen tersebut, tingkah laku pihak-pihak dan kebarangkalian keseluruhan kes tersebut (lihat perenggan 160–163 & 187)

(3) Tiada bukti bahawa ketika dia memindahkan tanah-tanah tersebut kepada perayu-perayu pada tahun 1980, Ong Sr membuat pengisytiharan, iaitu, bahawa dia memberitahu perayu-perayu pada masa pemindahan bahawa tanah-tanah tersebut harus dipegang atas amanah untuk kepentingan semua anak-anaknya. Tindakan dan peninggalan Ong Sr, baik secara nyata dan secara inferens, dalam jangka masa yang besar hampir 33 tahun sebenarnya menunjukkan bahawa tanah-tanah tersebut dipindahkan sepenuhnya kepada perayu-perayu (lihat perenggan 193 & 199).

(4) Beban pembuktian terletak kepada responden untuk membuktikan bahawa Ong Sr pada masa pemindahan tahun 1980 telah menyatakan secara yang jelas kepada perayu-perayu untuk mewujudkan amanah ke atas tanah asal tersebut. Bukti sebaliknya menunjukkan Ong Sr sebagai berkata bahawa 'selagi saya masih hidup, tanah-tanah tersebut akan dipegang oleh saya sepenuhnya dan sebarang pemindahan kepada anak-anak saya hanya akan berlaku selepas kematian saya'. Perayu-perayu betul-betul menggambarkan ini sebagai pelupusan saksi yang tidak memenuhi keperluan s 5 Akta Wasiat 1959. Dalam apa jua keadaan, ianya tidak konsisten dengan kewujudan amanah. Oleh itu, jelas bahawa perkataan tersebut adalah tidak jelas dan tiada pengisytiharan amanah (lihat perenggan 190–191).

(5) Keterangan ketika perbicaraan tersebut tidak membuktikan, pada keseimbangan kebarangkalian, bahawa perayu memegang tanah atas

amanah untuk anak-anak Ong Sr. Pendekatan hakim bicara adalah khilaf kerana beliau tidak mengambilkira perkara-perkara penting yang berikut: (a) kegagalan Ong Sr untuk menjelaskan kelewatan (selepas 33 tahun) di dalam Guaman 31 yang hartanah tersebut merupakan satu bentuk pegangan amanah oleh perayu-perayu; (b) kegagalan Ong Sr untuk menjelaskan wujudnya percanggahan dakwaan di dalam Guaman 31 bahawa hartanah tersebut adalah satu pegangan amanah untuk dia yang merupakan pemilik mutlak dan dakwaan hartanah tersebut dipegang oleh perayu-perayu secara pegangan amanah untuk kesemua anak lelaki Ong Sr; (c) sekiranya betul perayu-perayu berjanji seperti yang diplidkan oleh responden-responden di dalam Guaman 497, sepatutnya Ong Sr yang membawa tindakan ini terhadap perayu-perayu, bukannya responden-responden. Namun, Ong Sr tidak pernah mengambil tindakan terhadap perayu-perayu dan tidak menjual parsel dua dan tiga seperti yang dipersetujui oleh D1 di dalam mediasi tersebut; (d) Ong Sr tidak mengambil langkah untuk mengenepikan penghakiman persetujuan; (e) keterangan Ong Sr menunjukkan selagi dia masih hidup, hartanah tersebut dimiliki olehnya dan selepas kematiannya, hartanah tersebut dibahagi secara samarata anatara kesemua anaknya sepertimana wasiat yang bercanggah dengan s 5 Akta Wasiat 1959 dan juga bercanggah dengan pembentukan amanah; (f) tindakan Ong Sr yang menjadi saksi perjanjian pembahagian dan mengakui terma-termanya yang merujuk perayu-perayu sebagai pemilik hartanah tersebut; (g) dakwaan Ong Sr yang membantah perjanjian pembahagian melalui keterangan lisan terhadap konsultan, Lim Kooi Wah, namun beliau tidak pernah dipanggil pada hari perbicaraan; (h) perbuatan Ong Sr yang menyatakan bahawa dia tidak dapat menyatakan bantahan kepada OKY dan perayu-perayu kerana bergaduh namun tiada keterangan yang menunjukkan pergaduhan tersebut; (i) perbuatan D1 yang membuat semua pembayaran kepada konsultan-konsultan untuk pembahagian hartanah tersebut dan tiada bukti pembayaran dibuat oleh Ong Sr atau syarikat keluarganya; (j) fakta bahawa terma-terma di dalam penghakiman persetujuan di dalam Guaman 31, Ong Sr telah mengenepikan kesemua hak tuntutannya terhadap parsel dua dan tiga; (k) dakwaan Ong Sr bahawa dia memindahkan tanah asal pada 1980 kepada empat anak lelakinya (termasuk perayu-perayu) kerana mereka terlalu muda ketika itu adalah tidak masuk akal kerana ketika pemindahan hartanah tersebut, yang lain telah mencapai umur majoriti namun tiada sebarang usaha dibuat untuk memindahkan tanah asal tahun 1980 kepada mereka; (l) kegagalan Ong Sr untuk menjelaskan keperluan untuk memindahkan tanah asal 1980 kepada empat anak lelaki sedangkan satu anak lelaki sahaja sudah memadai; (m) kegagalan Ong Sr untuk memberikan sebarang keterangan yang menunjukkan dia telah 'dikhianati' oleh D1; (n) pengakuan Ong Sr bahawa perayu-perayu telah membayar cukai

pendapatan dari hasil hartanah tersebut. Sekirannya hartanah tersebut adalah harta amanah, cukai sepatutnya dibayar oleh Ong Sr atau oleh syarikat keluarga. Tetapi perkara tersebut tidak berlaku. Ini menunjukkan bahawa hartanah tersebut dimiliki oleh perayu-perayu sebagai pemilik sah hartanah tersebut; (o) tiada amanah didaftarkan ke atas hartanah tersebut menurut s 344 Kanun Tanah Negara; dan (p) perbuatan Ong Sr menerima 60% hasil dari penjualan parsel satu (menurut penghakiman persetujuan) menunjukkan parsel satu, dan melalui penambahan parsel dua dan tiga bukanlah satu harta amanah (lihat perenggan 195–196).

(6) Kekhilafan yang ketara mengenai keterangan yang relevan menjadikan keputusan hakim bicara bahawa terdapat amanah terhadap hartanah tersebut adalah salah (lihat perenggan 197 & 201–202).]

Cases referred to

B (Children), Re [2008] UKHL 35; [2009] 1 AC 11; [2008] 2 FCR 339; [2008] 4 All ER 1; [2008] Fam Law 619; [2008] 3 WLR 1; [2008] 2 FLR 141; [2009] AC 11; [2008] Fam Law 837, HL (refd)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 AMR 3921, FC (refd)

ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422; [2004] 6 AMR 119; [2004] 4 CLJ 674, CA (refd)

Fawziah Holdings Sdn Bhd v Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 MLJ 435; [2006] 1 CLJ 996, CA (refd)

Grant v Grant (1865) 55 ER 776 (refd)

Hameeda Bee v Mrs P Seenivasagam [1950] 1 MLJ 267, CA (refd)

Knight v Knight (1840) 49 ER 58 (refd)

Low Tin Yong @ Low Yong Lian v Low Yong Thuan [2016] 3 MLJ 332; [2016] 5 CLJ 217, CA (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)

Malacca Malay Guru-Guru Co-Operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors [1971] 1 MLJ 107, HC (refd)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124, SC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Ong Ching Chee & 3 Ors v Ong Ching Chee Realty Sdn Bhd [2014] 1 LNS 539, HC (refd)

Po Kin & Anor v Po Shein AIR [1926] PC 77, PC (refd)

Sinclair v Roy (1985) 20 DLR (4th) 748, SC (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)

Tan Kah Fatt & Anor v Tan Ying and another appeal [2021] MLJU 284; [2021] 1 LNS 264, CA (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Wan Naimah v Wan Mohamad Nawawai [1974] 1 MLJ 41; [1972] 1 LNS 164, FC (refd)
Yew Phaik Hoon v Quah Ooi Keat & Anor [1969] 1 MLJ 32, PC (refd)

Legislation referred to

Companies Act s 218(1)(f), (i)
Evidence Act 1950 ss 23, 101, 114(g)
Mediation Act 2012 s 16
National Land Code ss 340, 344, Form 14A
Wills Act 1959 s 5

Appeal from: Writ Summons No 22NCVC-497–10 of 2014 (High Court, Shah Alam)

Gopal Sri Ram (Felicia Ho Shok Heng, Siti Bahiyah bt Amir Haidi, How Li Nee, Marcus Lee, Mannvir Baljit Singh and Sharifah Alawiyah Syed Alwi with him) (Ho-Noecker & Pragasam) for the appellants.
Cyrus V Das (leading counsel for all respondents); Goh Keng Tat (Alexavier Lee Heng Seng with him) (Goh Keng Tat & Co) for the first respondent.
Abdul Rahim bin Abd Hadi (Kresha Paskaren with him) (Rajes Hisham Rahim & Gopal) for the second respondent.
Michael Chow (Wendy Yeong with him) (Michael Chow) for the third and fourth respondents.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is yet another unpalatable and lamentable case of a family dispute but dolorous in that it concerns a conflict between the patriarch of a family and his sons. The dispute here is in regards to a transfer of lands (in 1980) from the father to four of his sons (by his first wife). The sole question for the trial judge was whether the said transfer in 1980 was a settlement to create a trust and a valid trust brought into existence, or whether the transfer was an outright gift inter vivos by the father to his sons, vesting both legal and beneficial interests to the lands in the sons, as donees. The other critical issue is whether the plaintiffs can rely on what was said by one of the defendants some 33 years later, in the course of a mediation held in another suit in which the plaintiffs were not parties, to corroborate their claim that there was a trust created over the said lands. Thus, the critical issue in this entire case is singularly prosaic; was there a trust created over the lands in dispute?

[2] The appellants (defendants) were the registered proprietors of two parcels of land. The respondents (plaintiffs) sought a declaration that the lands which were registered in the names of the appellants were held in trust for all the sons of the patriarch of the family, Mr Ong Ching Chee ('Ong Sr'). A

[3] The appellants denied the existence of any trust and contended that the lands (before they were subdivided and registered in their individual names after a subdivision exercise in 1998) were transferred to them absolutely by Ong Sr (in 1980), for love and affection, and that they are the legal and beneficial owners of the disputed lands. It is common ground that the alleged trust is not in written form contained in any document. B C

[4] This is an appeal against the decision of the learned judge ('judge') of the High Court dated 26 August 2016 after a full trial of Suit No 22NCVC-497–10 of 2014 ('Suit 497'). Suit 497 was filed on 14 October 2014. At the end of the trial, which lasted several days, the judge allowed the respondents' claim and granted a declaration that the appellants held the lands in trust for all the sons of Ong Sr. The judge also made a consequential order that the lands be sold and that 1/10 portion of the proceeds of sale be given to each of the sons of Ong Sr. The first appellant was also ordered to pay damages in the sum of RM30,000 to the respondents. The appellants were ordered to pay RM50,000 as costs. The High Court order dated 26 August 2016 shall be referred to as 'the HC order'. D E

[5] As a result of the HC order, the respondents, the appellants, and all the other sons of Ong Sr became entitled to 10% of the proceeds of sale of the lands. The appellants filed the notice of appeal on 2 September 2016. They then applied for a stay of execution of the HC order pending the disposal of their appeal to the Court of Appeal. However, they were unsuccessful in their endeavour to obtain a stay. F G

[6] The HC order was eventually implemented/executed. Thus, the lands were sold and the parties have since been paid their monetary entitlements respectively as per the HC order. H

[7] The appeal came up for hearing before us on 1 March 2021. We heard arguments and reserved the matter for decision on 25 March 2021. On 1 March 2021, we had asked counsel to submit on a particular point relating to a settlor's right to deal with trust property. On 25 March 2021, we allowed the appeal and set aside the HC order. We dismissed the respondents' claim as per the re-amended statement of claim dated 19 February 2016. We then made a consequential order for restitution to the appellants, of all the monies which I

had been paid to the respondents pursuant to the HC order. We also ordered costs of RM80,000 as costs here and below. These are our reasons for allowing the appeal.

PROVING A TRUST — LEGAL REQUIREMENTS

[8] The plaintiffs as the protagonists in Suit 497 had pleaded that there was a trust over the land which was for the benefit of all the sons of Ong Sr. Thus, pursuant to s 101 of the Evidence Act 1950, it was the plaintiffs' burden to establish that there was such a trust over the land(s). The other relevant question is whether the existence of the trust must be proven beyond reasonable doubt, or on a balance of probabilities?

[9] We may start with the elements which are necessary for a valid trust. The legal test and elements which are necessary for determining the existence of a valid trust were formulated by Lord Langdale MR in *Knight v Knight* (1840) 49 ER 58 (*Knight v Knight*). The test postulates that *all* the three 'Cs' must be established, namely certainty of intention, certainty of subject matter, and lastly, certainty of object.

[10] In *Fawziah Holdings Sdn Bhd v Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 MLJ 435; [2006] 1 CLJ 996 (CA) the Court of Appeal referred to *Knight v Knight* and elaborated on the test as follows:

> [60] The law governing the certainty of a trust is that laid down by Lord Langdale MR in the seminal case of *Knight v Knight* [1840] 49 ER 58. There it was held that for a trust to be certain three requirements must be fulfilled. *First, there must be certainty of intention. Second there must be certainty of subject matter: both in terms of the corpus and the beneficial interest.* Third, *there must be certainty of the objects of the trust.* A trust is void if there is uncertainty in any of these three elements. (Emphasis added.)

[11] The practical consequence of the application of the legal test to a trial scenario may be seen from the pronouncement by the Court of Appeal in *Low Tin Yong @ Low Yong Lian v Low Yong Thuan* [2016] 3 MLJ 332; [2016] 5 CLJ 217 (CA) (*Low Tin Yong*) which held that in deciding whether a trust had come into existence, a *trial judge must analyse the evidence and determine whether the three essentials of a valid trust were in fact established* on the factual matrix.

[12] The Court of Appeal also said that the party who asserts that there exists a trust, had to prove that the alleged settlor had *uttered clear, unequivocal and irrevocable words for the purposes of creating a trust*. In an earlier case namely, *Hameeda Bee v Mrs P Seenivasagam* [1950] 1 MLJ 267 (*Hameeda Bee*) the Court of Appeal (Federated Malay States) said that *clear and unequivocal*

language must be used to establish a trust. A

[13] We turn next to the standard of proof. In this regard, we may once again refer to *Low Tin Yong* which held (p 346 MLJ; p 231 CLJ) that the *standard of proof* to be applied when determining whether or not a trust subsisted is one of *proof beyond reasonable doubt*, *rather than one on a balance of probabilities*. In this regard, the Court of Appeal in *Low Tin Yong* was merely reiterating the principle that was previously stated by the Court of Appeal of the Federated Malay States (FMS) in *Hameeda Bee* that a party who relies on the existence of a trust must establish it beyond reasonable doubt. In *Hameeda Bee*, the FMS Court of Appeal referred to the judgment of Viscount Cave LC in *Po Kin & Anor v Po Shein* AIR (1926) PC 77 on the standard of proof. B C

[14] However, the Court of Appeal's decision in *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; [2004] 6 AMR 119; [2004] 4 CLJ 674 (CA) (*ESPL*) appears to suggest that the standard of proof is lower than the criminal standard of proof. D

[15] In this regard, the Court of Appeal in *ESPL* referred to the judgment of Viscount Cave LC in *Po Kin & Anor v Po Shein* AIR [1926] PC 77 which was quoted in *Hameeda Bee* and said that the reference to proof beyond reasonable doubt in the Privy Council case should not be equated with the criminal standard, and that it was merely an emphasis of the *high degree of proof demanded by the circumstances*. E F

[16] It is however necessary to mention that in *Tan Kah Fatt & Anor v Tan Ying and another appeal* [2021] MLJU 284; [2021] 1 LNS 264 (CA), the Court of Appeal took the position that in light of the Federal Court's seminal decision in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 (FC) which enunciated that fraud in civil cases is to be proven on a balance of probabilities and the observations made by the Court of Appeal in *ESPL*, the standard of proof to establish the existence of a trust, is proof on a balance of probabilities. G

[17] With respect, we agree with the view expressed in *Tan Kah Fatt*. The decision of the Federal Court in *Sinnaiyah* on the issue of the standard of proof was predicated on the decision of the House of Lords in *Re B (Children)* [2008] UKHL 35; [2009] 1 AC 11; [2008] 2 FCR 339; [2008] 4 All ER 1; [2008] Fam Law 619; [2008] 3 WLR 1; [2008] 2 FLR 141; [2009] AC 11; [2008] Fam Law 837 (HL) and as encapsulated by the statement that there is 'only one civil standard of proof and that is proof that the fact in issue more probably occurred than not'. H I

[18] As stated earlier, clear, unequivocal and irrevocable words must be used

to create a trust. In *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41; [1972] 1 LNS 164 (FC) (*Wan Naimah*), the Federal Court referred to the following passage from the judgment of Sir John Romilly MR in *Grant v Grant* (1865) 55 ER 776 and said '… a declaration of trust *may be made quite informally, provided that the words used are clear and unequivocal*'.

[19] The passage from *Grant v Grant* referred to by the Federal Court (at p 777) reads as follows:

> The question here is whether the husband has used words which are equivalent to a declaration of trust. In the first place, *these words need not be in writing* that is quite settled by the authorities. *They must be clear, unequivocal and irrevocable*, but it is *not necessary to use any technical words*, it is *not necessary to say, 'I hold the property in trust for you',* nor is it necessary to say, 'I hold the same for your separate use'. *Any words that shews that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust*. I think that it is also sufficient for the purpose of shewing that the trust has been created, *if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created*. (p 777.) (Emphasis added.)

[20] And at p 778, Sir John Romilly MR focussed on the settlor's 'intention' and said relevantly,

> I admit that *a mere intention to give would not be conclusive*, and that it must be shewn that the property has really been given …

RELATIONSHIP OF THE PARTIES — NOMENCLATURE

[21] For ease of identification, we shall refer to the parties as they were in the High Court, ie appellants (collectively) as the 'defendants' and the respondents as the 'plaintiffs'.

[22] The defendants are Mr Ong Kong Beng and Mr Ong Kong Seong. They were the first defendant and second defendant respectively in Suit 497. We shall refer to Mr Ong Kong Beng individually as 'D1', and Mr Ong Kong Seong as 'D2'. The plaintiffs are Mr Ong Kong Leong (first plaintiff — 'P1'), Mdm Chng Ai Guat (second plaintiff — 'P2'), Mr Ong Kong Kuan (third plaintiff — 'P3'), and Mr Ong Kong Yee (fourth plaintiff — 'P4'). Where necessary, we shall refer to the plaintiffs individually by their alpha-numeric title, as P1, P2, P3 or P4, as the case may be.

[23] Ong Sr is the biological father of D1, D2, P1, P3 and P4. Ong Sr's first wife is Mdm Ng Siew Ngor ('Mdm Ng'). Ong Sr's second wife is Mdm Chong Chit Eng ('Mdm Chong').

[24] Ong Sr's eldest son by his first wife is Mr Ong Kuang Heyan (deceased) ('Heyan'). Heyan died on 29 December 2004. He was 51 years old when he died. P2 is Heyan's widow.

[25] Mdm Ng is the mother of D1, D2 and P1. Mdm Chong is the mother of P3 and P4. Ong Sr's family which encompasses Mdm Ng, Mdm Chong and their respective children, shall be referred to collectively as the 'Ong family'.

MDM NG'S CHILDREN

[26] Ong Sr's children through Mdm Ng are:

(a) Ong Bee Lian (f);

(b) Ong Kuang Heyan (died on 29 December 2004) (his widow is Mdm Chng Ai Guat — P2);

(c) Ong Kong Beng (D1);

(d) Ong Kong Seong (D2);

(e) Ong Kwong Yew ('OKY');

(f) Ong Bee Hooi (f);

(g) Ong Bee Lee (f);

(h) Ong Kong Him;

(i) Ong Kong Leong (P1);

(j) Ong Kong Seng;

(k) Ong Bee Wah (f); and

(l) Ong Kong Lim.

MDM CHONG'S CHILDREN

[27] Ong Sr's children through Mdm Chong are:

(a) Ong Kong Kuan (P3) (born on 6 April 1971); and

(b) Ong Kong Yee (P4) (born on 18 January 1974).

TRANSFER OF THE LAND (1980)

[28] Sometime in the 1970s, Ong Sr together with a few others (non-family members) acquired a large portion of land in Bukit Changgang. Ong Sr became the owner of 8/20 undivided shares of land known as Title No 10672, Land No 9708, Mukim of Tanjong Dua Belas, District of Kuala Langat, State of Negeri Selangor Darul Ehsan ('original land').

[29] On 19 June 1980, Ong Sr transferred part of his shares in the original land, for 'love and affection', to the defendants and two of his other sons, namely, Heyan and OKY. Ong Sr was 53 years old at that time. This was done by an instrument of transfer (Form 14A) dated 19 June 1980, by which Ong Sr transferred part of his 8/20 shares in the original land, for 'love and affection', to the defendants. Part of his portion of the original land was also transferred to two of his other sons, namely Heyan and OKY. These transfers were registered on 10 September 1981. For convenience, we shall refer to this as the '1980 transfer'. The 1980 transfer was attended to by an advocate and solicitor by the name of Cheah Kam Chiew and the transfer form in Form 14A was prepared by one Lau Sek Chee (DW1). DW1, in his oral evidence in court, remembers vividly that Ong Sr's intention was always to share the lands in Bukit Changgang with his sons.

[30] It was contended for the plaintiffs that the evidence of the said Lau Sek Chee clearly shows that Ong Sr had at all times intended that the lands in Bukit Changgang be shared among himself and his sons. D1 confirmed, under cross-examination, that Ong Sr had intended to share the lands in Bukit Changgang. It was emphasised on behalf of the plaintiffs that D1's admission that the lands in Bukit Changgang was to be shared between Ong Sr and the sons is testament to the fact that the lands were meant for the benefit of the family and to be shared amongst Ong Sr and the other sons, and not just limited to the D1 and D2.

[31] Sometime in 1987, the portions of the land held by Ong Sr, Heyan and some of the other co-owners, were compulsorily acquired by the State. They were all compensated. Ong Sr received RM1,443,060 whereas Heyan received RM319,950. The compensation monies were used to acquire a company called Chendawan Usaha Sdn Bhd. This is elaborated further in the subsequent paragraphs of this judgment.

SUBDIVISION (DECEMBER 1998)

[32] On 30 December 1998, some of the co-owners of the land (non-family members) together with the defendants and OKY, entered into a formal subdivision agreement dated 30 December 1998 ('subdivision agreement') for the purpose of subdividing their portions of the original land. The subdivision agreement expressly stated that the defendants and OKY were the landowners. The defendants and OKY's portions of the original land were subsequently subdivided and individual titles were issued. After the land was subdivided, one parcel, namely Geran 232381 Lot 13 Seksyen 2 Pekan Bukit Chaggang, Daerah Kuala Langat, Negeri Selangor Darul Ehsan ('Parcel 1') was registered in the name of OKY. Another part of the subdivided land held under Geran Hakmilik No 232386 Lot 18 Seksyen 2 Pekan Bukit Changgang Daerah Kuala

Langat Negeri Selangor ('Parcel 2') was registered in the name of D2. The final portion of the subdivided land, held under Geran Hakmilik No 232387 Lot 19 Seksyen 2 Pekan Bukit Changgang Daerah Kuala Langat Negeri Selangor ('Parcel 3') (collectively referred to as 'the lands') was registered in the name of D1.

[33] Ong Sr witnessed the execution of the subdivision agreement. According to the defendants, *Ong Sr did not object to the subdivision and/or the issuance of titles for parcels one, two and three to the defendants and OKY*. But Ong Sr said that he did raise an objection. The defendants also make the point that D1 made all the payments to consultants in relation to the subdivision agreement.

[34] During the trial, Ong Sr said that he objected to the subdivision and this was (according to him) verbally communicated to the consultant who was engaged to do the subdivision, Lim Kooi Wah. But Lim Kooi Wah was not called to testify.

[35] However, at the same time, Ong Sr also said that he could not object to the subdivision as he had by then 'quarrelled' with the defendants. The defendants say that there was no quarrel in December 1998. The quarrel or dispute only arose in 2013.

[36] As far as the defendants are concerned, at all material times, or at least since around 1980/1981, they were the registered co-owners of the parcel of land which was transferred to them by Ong Sr.

OKY — SUIT 31

[37] Although the claim in Suit 497 was only concerned with Parcels 2 and 3, it is nevertheless necessary to refer to the circumstances relating to the earlier legal proceedings in regards to Parcel 1 as elaborated below.

[38] We turn now to OKY and the relevance of Shah Alam High Court Writ No 23NCVC-31–11 of 2013 ('Suit 31') to Suit 497. OKY is not a party to Suit 497. But he testified at the trial as a witness for the defendants. He supported the position that was taken by the defendants. Parcel 1 is not part of the claim in Suit 497. It is however, an important part of the factual matrix in that Parcel 1 together with Parcels 2 and 3, were the subject matter of an earlier action which was commenced by Ong Sr namely Suit 31. D1, D2 together with OKY, were the defendants in Suit 31. In Suit 31, Ong Sr claimed that parcels one, two and three were *held on trust for him*. The plaintiffs in Suit 497 were not parties to Suit 31. Suit 31 was fixed for trial before the learned judicial commissioner ('JC').

A **[39]** The JC took the view that since the case involved family members, the dispute should be resolved via mediation. The JC successfully conducted the mediation. Ong Sr and his counsel, Mr Lee See Loon (PW2) participated in the mediation. D1 was also involved in the mediation. The plaintiffs were not involved in the said mediation. PW2 confirmed that in Suit 31, Ong Sr claim
B in respect of parcels one, two and three was as an 'absolute beneficial owner'.

[40] On *23 July 2014,* a consent judgment was recorded in Suit 31 ('consent judgment'). It was a term of the consent judgment that Parcel 1 be sold at not
C less than the market value and the proceeds shared between Ong Sr and OKY in the proportion of 60:40, respectively.

[41] Pursuant to cl 2.2 of the consent judgment, Parcel 1 was sold and the proceeds were shared between Ong Sr and OKY accordingly in the proportion
D of 60:40. The 40% of the proceeds was then shared equally amongst Ong Sr's ten sons.

[42] Pursuant to the consent judgment, Ong Sr had *expressly and unequivocally relinquished his rights (if any) over Parcels 2 and 3*. However, it is
E alleged by Ong Sr and his counsel (PW2) (who was present at the mediation) that during the mediation, D1 had declared and undertaken that he would sell Parcels 2 and 3 and distribute the proceeds equally to Ong Sr's sons.

F **[43]** In Suit 497, Ong Sr testified that he would not have relinquished his right over Parcels 2 and 3, but for D1's said declaration and undertaking. In Suit 497, the plaintiffs have alleged that D1 and D2 have reneged on the undertaking.

G **[44]** It should be mentioned here that PW2 agreed during cross-examination that pursuant to the terms of the consent judgment, Ong Sr has no right or claims whatsoever in regards to Parcels 2 and 3. However, during cross-examination Ong Sr disagreed that he had relinquished his rights (if any) over Parcels 2 and 3. It is not in dispute, however, that Ong Sr never took any
H steps to set aside the consent judgment.

[45] The plaintiffs' case in Suit 497 is that it was always Ong Sr's intention that the lands be shared equally by his ten sons and that consistent with that intention, there was always a trust over the lands.
I

[46] In substance, the plaintiffs' case was that all assets of the Ong family, including shares in the family companies, or lands held by the sons (defendants) or other assets, are to be shared equally by the ten sons of Ong Sr.

[47] Further, the plaintiffs contended that D1's declaration and undertaking, during the mediation in Suit 31, that he would sell Parcels 2 and 3 and distribute the proceeds equally to Ong Sr's sons only served to bolster the claim that there was in existence a trust.

[48] Thus, the plaintiffs proceeded to file Suit 497. Ong Sr is however, not a party to Suit 497. But he testified on behalf of the plaintiffs. Ong Sr said that it was always his intention that the lands be shared equally by his 10 sons.

[49] The judge quite correctly regarded Ong Sr as the most critical witness in relation to the question as to the existence of a trust over the lands.

SUIT 338

[50] Now, although Parcel 1 was sold and the proceeds shared as per the consent judgment, Ong Sr was not happy with the price at which Parcel 1 was sold. On *22 June 2015,* Ong Sr filed Suit No 22NCVC-338–06 of 2015 ('Suit 338') against OKY claiming, inter alia, that the latter had sold Parcel 1 at an undervalue.

[51] It is significant that the defendants in Suit 497 were not named as parties to Suit 338 albeit *Suit 497 was filed on 14 October 2014*. Ong Sr was aware that the plaintiffs had filed Suit 497 and that the plaintiffs had alleged that the defendants had reneged on the declaration/undertaking to sell and distribute the lands.

[52] The defendants' central complaint in the present appeal is that the plaintiffs had failed to discharge the burden of proving that there was a trust over the lands. Specifically, the defendants contend that the plaintiffs had failed to establish the essential elements necessary for the creation of a valid trust. According to the defendants, the judge had failed to judicially appreciate and assess the oral evidence as well as the documentary evidence and all the attendant circumstances. The defendants contend that the judge was plainly wrong in making a finding that they were holding the lands on trust for Ong Sr's male heirs.

[53] According to the defendants, there was a demonstrable misunderstanding of the relevant evidence and that the judge had also relied on inadmissible evidence, namely the deliberations that took place during the mediation in Suit 31.

[54] At any rate, the defendants contend that the judge failed to consider relevant evidence and that having due regard to the evidence that was presented at the trial, his decision is one that no reasonable judge could have reached.

A THE PLEADED CASE

[55] The material facts in the *re-amended statement of claim* which were relied upon by the plaintiffs to support the existence of a trust over the lands are as follows:

B

> 12. The plaintiffs were made aware by the defendants that Parcel 1 was registered in the personal name of Ong Kwong Yew, that Parcel 2 was registered in the personal name of the 2nd Defendant and that Parcel 3 was registered in the personal name of the 1st Defendant.
>
> C 13. In addition to the above, the plaintiffs were also aware that notwithstanding that the said parcels of land were held in the personal names of, inter alia, the 1st and 2nd Defendant, the said Ong Ching Chee had been responsible towards payment in respect of the purchase of all said parcels of land together with all other costs and expenses (such as payment of quit rent and assessment charges) due on the said
>
> D parcels of land.
>
> 14. The plaintiffs were also made aware by the said defendants that notwithstanding that the said parcels of land were held in the personal names of the 1st and 2nd defendants and Ong Kwong Yew, the said parcels of land would eventually be distributed equally among his father's (Ong Ching Chee's) sons. The lands were
>
> E placed in the personal names of the defendants and the said Ong Kwong Yew given that the rest of the sons were still minors at the time of the transfer and was to be held by his (Ong Ching Chee's) respective sons as aforesaid until such time that all the other sons reached the age of maturity.
>
> 15. The plaintiffs were not surprised by this position given the said Ong Ching
>
> F Chee had previously appointed a trustee [sic] hold shares in respect of his (Ong Ching Chee's) minor children and this was evident when he (the said Ong Ching Chee) acted as guardian and trustee in respect of shares due to the 1st plaintiff himself, Ong Kong Hin, Ong Kong Seng and Ong Kong Lim as well as appointing Chong Chit Eng as guardian and trustee in respect of shares due to 3rd and 4th
>
> G plaintiffs, Ong Kong Kuan and Ong Kong Yee. The said shares were shares in Ong Ching Chee Realty Sdn Bhd.
>
> 16. The 1st plaintiff had no reason to doubt the aforesaid position given that relations between the said Ong Ching Chee and the children including the plaintiffs and the defendants had been very good. In addition, the 1st plaintiff's relationship
>
> H with the defendants was also very good and they were directors and shareholders in common companies owned by the said Ong Ching Chee.
>
> 17. In addition to the companies started by Ong Ching Chee, the 1st plaintiff and the 1st Defendant (together with Ong Kwong Yew) were shareholders and directors in a separate and independent company known as Jasa Jelas Sdn Bhd.
>
> I ...
>
> 23. The suit to recover the said parcels of land was filed in Shah Alam High Court vide Shah Alam High Court Writ No. 23NCVC-31-11/2013.
>
> ...

29. Eventually, the said Ong Ching Chee agreed to waive his claim against Parcel 2 and Parcel 3 of the lands when the defendants, in particular the 1st Defendant declared that he would distribute the said parcels of land among all the sons equally.

30. As part of the settlement, the said Ong Ching Chee agreed that he too would distribute a portion of Parcel 1 (which Parcel was to be given to the said Ong Ching Chee) equally among all the sons.

31. By agreement, a consent order in respect of Parcel 1 was recorded wherein Parcel 1 was to be sold and from the proceeds of the said sale, 60% of the same will be given to Ong Ching Chee and the balance 40% will be distributed equally amongst all the sons.

32. The plaintiffs were satisfied with the settlement mentioned in paragraphs 29 and 30 above given that his beneficial interest in Parcel 2 and Parcel 3 of the lands would remain unaffected and untouched and despite the said Ong Ching Chee obtaining Parcel 1, the plaintiffs would still receive a 1/10 share in the 40% of the sale proceeds of Parcel 1.

...

34. Given that Parcel 1 of the said parcels of land was being sold, the 1st plaintiff proceeded to ask the 1st and 2nd defendants if they had considered selling Parcels 2 and 3 at the same time and thereafter distribute the proceeds among the sons.

35. Notwithstanding the earlier assurances and promises made that Parcels 2 and 3 would be distributed equally to all the sons, the 2nd and 1st defendants informed the 1st plaintiff that he did not have a share in Parcels 2 and 3 and that the said parcels of land belonged to them respectively.

36. The plaintiffs contend and will contend at the trial of this action or in any interlocutory proceedings arising from this action that the 1st and 2nd defendants are holding Parcel 2 and Parcel 3 of the lands on trust for all the sons (or their estate) of the said Ong Ching Chee.

36A. Such position is consistent with the intention of Ong Ching Chee from the beginning in relation to his assets and lands whereby when Parcel 1 was successfully sold, the 2nd plaintiff's solicitors have via letter dated 3.3.2015 received on her behalf the sum of RM384,663.30 which is the portion the Deceased's estate entitled and such sum was received by the 2nd plaintiff.

37. In addition to the above, the plaintiffs state that 1st and 2nd defendants have acted in a manner calculated to create a profit greater for themselves at the expense of the plaintiffs.

PARTICULARS

(a) the 1st and 2nd defendants knew or ought to have known that the said Ong Ching Chee would not have agreed to any form of settlement had they (the 1st and 2nd Defendant) not agreed to distribute the said parcels of land (Parcel 2 and Parcel 3) equally among all the sons of Ong Ching Chee;

(b) the 1st and 2nd defendants knew or ought to have known that the [sic] their brothers, including the plaintiffs, would not consent to any

settlement or arrangement to be reached with Ong Ching Chee in the event that Parcel 2 and Parcel 3 were not to be divided equally amongst the sons;

(c) by stating that they (the 1st and 2nd defendants) are keeping the lands for themselves after a consent arrangement had been reached the 1st and 2nd defendants have acted in a manner calculated to obtain a share much greater than they would have been entitled to under the trust position.

38. The plaintiffs contend and will contend at the trial of this action that the conduct of the 1st and 2nd defendants have made them liable to a claim for exemplary damages.

39. Wherefore the plaintiffs pray as follows:

(a) a declaration that the 1st and 2nd defendants are holding Geran Hakmilik No. 232386 Lot 18 Seksyen 2 Pekan Bukit Changgang Daerah Kuala Langat Negeri Selangor ('Parcel 2') and Geran Hakmilik No. 232387 Lot 19 Seksyen 2 Pekan Bukit Changgang Daerah Kuala Langat Negeri Selangor ('Parcel 3') in equal shares on trust for all the sons of the said Ong Ching Chee including the plaintiff;

(b) that the said lands that is Geran Hakmilik No. 232386 Lot 18 Seksyen 2 Pekan Bukit Changgang Daerah Kuala Langat Negeri Selangor ('Parcel 2') and Geran Hakmilik No. 232387 Lot 19 Seksyen 2 Pekan Bukit Changgang Daerah Kuala Langat Negeri Selangor ('Parcel 3') be sold within 1 month from the date of this order and that 1/10 of the proceeds of sale be distributed to the plaintiffs by the defendants within 7 days from the date of receipt of the sale proceeds.

THE DEFENCE

[56] Essentially, the defence was that the lands were an outright gift by Ong Sr to his sons, and that there was no trust. The defence was pleaded as follows:

Pembelaan Defendan Pertama dan Kedua

6. Seterusnya merujuk kepada perenggan 12 penyataan tuntutan tersebut, Defendan-Defendan menyatakan seperti berikut:

a) sekitar tahun 1980, anak-anak lelaki isteri pertama Ong Ching Chee terutamanya Defendan-Defendan termasuk Ong Kuang Heyan yang meninggal dunia pada masa kini dan Ong Kwong Yew telah memajukan perniagaan pengangkutan yang dijalankan secara kecil-kecilan oleh Ong Ching Chee dengan mendaftarkan dua (2) buah syarikat, iaitu Ong Ching Chee Realty Sdn Bhd dan Ong Ching Chee LorryTranspoit Sdn Bhd:

b) Oleh kerana tindakan pengkorporatan kedua-dua syarikat telah membawa kepada tanda-tanda perkembangan perniagaan, Ong Ching Chee telah memindah milik sebahagian hartanah tersebut kepada Defendan-Defendan, Ong Kuang Heyan dan Ong Kwong Yew atas dasar kasih sayang (love and affection), sebagai pemberian dan/atau balasan

untuk perkembangan perniagaan keluarga yang dilakukan oleh Defendan-Defendan, Ong Kuang Heyan dan Ong Kwong Yew dimana selepas pemindahan dilakukan kedudukan milikan bahagian hartanah tersebut adalah seperti berikut:

THE TRIAL — WITNESSES

[57] The witnesses who testified for the plaintiffs and defendants in the trial are:

For the plaintiffs:

(a) Ong Ching Chee (Ong Sr) (PW1);

(b) Lee See Loon (Advocate and Solicitor) (PW2);

(c) Mdm Chong Chit Eng (PW3);

(d) Ong Kong Kuan (P3) (PW4);

(e) Chng Ai Guat (P2) (PW5); and

(f) Ong Kong Leong (P1) (PW6).

For the defendants:

(a) Datuk Lau Sek Chee (DW1);

(b) Ong Kong Beng (D1) (DW2);

(c) Ong Kong Seong (D2) (DW3); and

(d) Ong Kwong Yew (OKY) (DW4).

THE TRADITIONAL CHINESE FAMILY

[58] The Ong family was at all material times led by Ong Sr, as the patriarch. The Ong family comprising of Ong Sr, Mdm Ng and her children are described as 'the first family' whereas the family of Ong Sr, Mdm Chong and her children are 'the second family'. Ong Sr was at all material times a businessman and was a man of means with diverse business interests including:

(a) real estate investment;

(b) investment holding;

(c) palm oil plantation;

(d) palm oil production;

(e) cocoa plantations; and

(f) logistics and transport services.

[59] According to the plaintiffs and as determined by the judge, whilst Ong Sr had 14 children, he ran the household in a traditional Chinese manner, that is:

(a) his word was the law;

(b) sons were given more prominence than daughters; and

(c) sons were included and expected to participate in the family business.

[60] According to counsel for the plaintiffs, judicial recognition has been given to the family and business arrangements in a traditional Chinese family set-up where business affairs are made based on understanding and convention very often at the behest of the patriarch.

[61] Thus, counsel for the plaintiffs said that the absence of any formal documentation in relation to the trust over the lands is not at all surprising as this was a traditional Chinese family. As such, despite the absence of the requisite documentation evidencing a trust, it was contended that the court may nevertheless examine the entire gamut of evidence including conduct of the parties, and determine whether there was a trust.

[62] In regard to the lack of proper legal form for the creation of a trust, counsel relied on a passage from the judgment of Lord Wilberforce in *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32 at p 34 (PC) which reads as:

> Their Lordships approach *the difficult task of arriving at a factual conclusion* with two considerations in mind. *First, the form in which the appellant's claim is made is by setting up a trust*, binding initially upon Yew Hun Eng, and later, by transmission upon the respondents. *There are obvious dangers in seeking to impose conceptions of English equity upon persons such as those concerned in the present case, lacking in knowledge of English institutions and to a large extent, in literacy.*
>
> *Secondly, the transactions relating to the disputed land form part of the intricate arrangements of a large Chinese family, whose business affairs may well be managed upon a basis of understanding and convention, well appreciated by its members, but not easily made explicit in legal form.* It may well be that the reality of the matter is that these lands, as other assets, were not intended to belong exclusively to any one or two persons but represented, in an undefined and fluid sense, family property.
>
> The present litigation has presented the courts with two stark alternatives, neither of which may satisfactorily reflect what either side intended — yet the choice has to be made between them. (Emphasis added.)

THE FAMILY COMPANIES

[63] By the mid 1970s, as intended by Ong Sr, two of his sons had already started working with him. D2 was the first son to join Ong Sr with a very

limited role in 1970. D2 was only 13 years old and hardly educated. D2 dropped out of school after standard six. Heyan who was the eldest of the male siblings, was the next to join Ong Sr, D1 was the next to join Ong Sr in 1979/1980 followed by OKY. The end of the 1970s also saw a shift in the pattern in which Ong Sr conducted his business. In 1979, he incorporated his first company, that is Ong Ching Chee Realty Sdn Bhd followed by Ong Ching Chee Lorry Transport Sdn Bhd in 1980. This was followed by Pengangkutan Jasa Sdn Bhd in 1985, the acquisition of Chendawan Usaha Sdn Bhd in 1987, the incorporation of Ong Ching Chee Capital (M) Sdn Bhd in 1997 and then Elegant Palms Sdn Bhd in 2001.

[64] It is the plaintiffs' case that the formation, incorporation and/or acquisition of these six companies were crucial to Ong Sr's intention to include his sons in the family business in that:

(a) the existence of these private limited companies enabled Ong Sr to divest and place shares in the names of each and every one of his sons;

(b) all of Ong Sr's sons are shareholders in one or more of the family companies; and

(c) all the sons (save for two who are living and working overseas) are directors of one or more of the family companies. The only daughter who was involved in the family business was Ong Bee Lee who was the accounts and administration manager for the family companies.

[65] According to the plaintiffs, the inclusionary nature of the six companies is typical of Chinese family companies and they are essentially quasi-partnerships.

WINDING UP OF THE FAMILY COMPANIES

[66] In 2013, disputes arose within the Ong family. There were allegations made by P3 against D1 and OKY. These matters were escalated to Ong Sr, who sided with P3. D1 retaliated and took steps to remove Ong Sr and those aligned to him, from office and excluded them from management of the family companies and/or from being paid their emoluments. This resulted in a complete breakdown in mutual trust and confidence between the two factions of the Ong family. This led Ong Sr and those aligned to him, to file petitions to wind up the companies under s 218(1)(f) and (i) of the Companies Act.

[67] The petitions were registered as:

(a) Shah Alam High Court Petition No 28–435–09 of 2013 (Ong Ching Chee & 2 Ors v Ong Ching Chee Lorry Transport Sdn Bhd);

(b) Shah Alam High Court Petition No 28–434–09 of 2013 (Ong Ching Chee & 3 Ors v Ong Ching Chee Realty Sdn Bhd);

(c) Shah Alam High Court Petition No 28–433–09 of 2013 (Ong Kong Kuan v Pengangkutan Jasa Sdn Bhd);

(d) Shah Alam High Court Petition No 28–432–09 of 2013 (Ong Ching Chee & 3 Ors v Elegant Palms Sdn Bhd);

(e) Shah Alam High Court Petition No 28NCC–53–11 of 2013 (Ong Ching Chee & Anor v Ong Ching Chee Capital (M) Sdn Bhd); and

(f) Tawau High Court Petition No TWU-28NCC-2/10 of 2013 (Chong Chit Eng & 2 ors v Chendawan Usaha Sdn Bhd).

[68] The five petitions in the Shah Alam High Court were heard together and the companies were ordered to be wound up on 9 April 2014 by Justice Lim Chong Fong (see *Ong Ching Chee & 3 Ors v Ong Ching Chee Realty Sdn Bhd* [2014] 1 LNS 539 (HC)). On 3 July 2014, the High Court at Tawau allowed Petition No TWU-28NCC-2/10 of 2013 (*Chong Chit Eng & 2 Ors v Chendawan Usaha Sdn Bhd*) and the company was wound up accordingly. The plaintiffs laid considerable emphasis on the findings that were made by Justice Lim Chong Fong to assert that these were family run companies. Reference was made in particular to para 29 of the judgment where Justice Lim Chong Fong held:

> In this case, I am satisfied and accept the six aforesaid grounds raised by the petitioners justifying that the respondent is in fact and law a 'quasi partnership'. The respondent here is a Chinese family owned company amongst the stable of the Ong family related companies.
>
> The patriarch is undoubtedly Ong Senior who is now in his twilight years. He founded the companies and/or funded their conception and operations. He together with his sons participated in the growth and development of the companies for over 30 years.
>
> From the evolution and transformation of the shareholding structure and appointment to the board of directors of the companies, I find and hold it is Ong Senior's desire that the Ong family companies would be operated harmoniously with fair participation by all his children. This is tacit wish all along which is typical of a Chinese patriarch.
>
> *Notwithstanding that his older sons from the first marriage were involved in management of the companies in the early formative years, it necessarily follows that the older sons must devolve and share the running of the companies with his younger sons from the second marriage with the passage of time. The patriarch stays on to ensure and oversee the fulfilment of that wish.*
>
> There is in this sense no distinct separation between family and company with the minority yielding company control to the majority. In my view these are incidences of the unique characteristic of Chinese companies as alluded to in the Australian Journal of Corporate Law article cited by the respondent. (Emphasis added.)

[69] The respondents in the respective petitions lodged appeals to the Court of Appeal against the winding up orders that were made by the High Court. However, the appeals were subsequently withdrawn. Thus, it is contended in the present appeal that the decision of Justice Lim Chong Fong stands. Counsel for the plaintiffs said that the findings made by Justice Lim Chong Fong on the family arrangement are consistent with the contention by the plaintiffs of the sharing mechanism forming the basis of the plaintiffs' claim in Suit 497.

[70] According to counsel, the defendants are bound by the findings that were made by Justice Lim Chong Fong and that the High Court and by extension the Court of Appeal would likewise have to take cognisance of the same.

THE SHARING MECHANISM

[71] One of the critical building blocks of the plaintiffs' case vis a vis the existence of a trust over the lands was that there was a 'sharing mechanism' that was always in place. According to the plaintiffs, Ong Sr's position as the patriarch of the family was such that he controlled the manner and division of the family assets. It was contended that from the documentary evidence, it is apparent that Ong Sr would place assets in his own name, as well as in the names of certain sons (particularly Heyan and D1) and thereafter he would transfer the same or direct Heyan and D1 to transfer the said assets to the other sons. The plaintiffs' case is that the sharing mechanism is not limited to Ong Ching Chee Realty Sdn Bhd but applied across the other five companies as well. Counsel for the plaintiffs said that the sharing mechanism fortifies the plaintiffs' argument that although the assets such as shares, are registered in the name of one of Ong Sr's sons, it never really belonged to that particular son and Ong Sr had overriding authority over the assets, and for their part the sons never treated the assets as their own. The plaintiffs contend that the same mechanism applied to the lands as well.

ACQUISITION OF PART OF THE LANDS

[72] As stated earlier, in 1987, a large portion of the lands in Bukit Changgang was subject to compulsory acquisition by the government. Ong Sr and Heyan's portion was acquired and compensation was duly paid.

[73] The plaintiffs contend that the compensation sum was not kept for personal use or gain, but rather reinvested for the benefit of the Ong family in particular the sons. The said compensation sum was used to acquire Chendawan Usaha Sdn Bhd ('CUSB'). CUSB was a family company of which all the sons were shareholders and from which they all received a benefit. The compensation sums were also used to replant the agriculture land that CUSB

held from cocoa to palm oil. This fact is confirmed by Ong Sr who testified to this effect during cross-examination. D1 and D2 denied this fact in their respective witness statements. However, under the weight of overwhelming evidence to the contrary, they admitted during cross-examination, that the acquisition sums were used to acquire CUSB.

[74] Thus, the plaintiffs contend that the evidence before the High Court was clear, ie although a portion of the lands in Bukit Changgang was acquired, the monies received were reinvested for the benefit of the family and this is perfectly in line with the sharing mechanism envisaged by Ong Sr.

USAGE AND UPKEEP OF THE REMAINDER LANDS

[75] The plaintiffs contend that, post-acquisition, the remainder lands in Bukit Changgang were also used for the benefit of the Ong family. The two lots namely Parcels 2 and 3, although in the names of the D1 and D2, were not used by them for personal purposes or for self-gain.

[76] Although Ong Sr was no longer the registered proprietor of the lands, Ong Sr was informed of dealings relating to the lands in Bukit Changgang in respect of which his consent was obtained.

[77] According to the plaintiffs, Ong Sr's dominion over the lands fortifies their position that whilst the lands were registered in the names of D1, D2, and OKY, they viewed Ong Sr as the true and ultimate owner of the same and that they were only trustees for the same. It is alleged that apart from using the lands in Bukit Changgang solely for the benefit of the Ong family and keeping Ong Sr informed of dealings related to the lands in Bukit Changgang D1, D2, and OKY did not make any payment towards the upkeep and maintenance of the lands in Bukit Changgang.

[78] In particular, it was alleged that the quit rent and assessment for the lands in Bukit Changgang were paid by the family companies given that the lands in Bukit Changgang are family lands save for years 2010 to 2013 where Ong Sr paid for the same from his own pocket. But this is a controversial topic as the defendants contend that they paid the quit rent and assessment. They claimed that all evidence relating to payment of quit rent and assessment for the lands in Bukit Changgang up to 2010 was removed by P3 and Ong Sr. However, the plaintiffs maintain that it was established that the documents claimed to be removed were documents relating to the family companies. It did not relate to personal documents and this was also reflected in the letters written to OKY as well as the police report lodged by OKY. This was also confirmed by D1 and OKY in cross-examination.

FRACTURING OF RELATIONSHIP AND HOW DEFENDANTS CHANGED THEIR POSITION

[79] As mentioned earlier, the relationship of the Ong family was irreparably fractured in 2013. The family was split into two factions. Counsel for the plaintiffs emphasised that it was at this point in time that D1 brazenly told Ong Sr that any assets that were not placed in his (Ong Sr's) name were no longer his. This is admitted by D1 in cross-examination.

[80] Counsel for the plaintiffs said that D1 would not have uttered those words if the lands truly belonged to him. In addition, to depriving Ong Sr of the assets, D1 also took steps to remove Ong Sr and members of the second family namely P3 and Madam Chong from the management of the family companies. This led Ong Sr and the second family filing petitions to wind up the family companies. The petitions were opposed by the first family led by D1. Despite the first family's effort to oppose the winding up petitions presented by Ong Sr and the second family, all the petitions to wind up the family companies were allowed by the Shah Alam High Court and the Tawau High Court.

PARCELS ONE, TWO AND THREE HELD ON TRUST FOR ONG SR — SUIT 31

[81] On 9 November 2013, Ong Sr filed Suit 31. This was roughly 33 years after the original land had been transferred to the defendants. Ong Sr filed Suit 31, to recover parcels one, two and three from the defendants and OKY, claiming that they were *held on trust for him*. In Suit 31 Ong Sr claimed ownership of parcels one, two and three as the absolute beneficial owner.

[82] The defendants in Suit 31 were D1, D2 and OKY. Suit 31 was fixed for trial. The plaintiffs in Suit 497 were not parties to Suit 31. Pursuant to a court-led/assisted mediation, a compromise was reached between Ong Sr, D1, D2 and OKY in respect of Parcel 1 only. According to the plaintiffs, during the course of the settlement negotiations, D1 had declared and undertaken that he would distribute Parcels 2 and 3 amongst the brothers.

THE DEFENDANTS' POSITION — THE LANDS WERE NOT HELD ON TRUST

[83] In repudiating the allegation that they were holding the lands on trust, the defendants contended that Ong Sr had voluntarily executed a Memorandum of Transfer ('MOT') in 1980 to transfer ownership of the lands to them in consideration of love and affection. In amplification, the defendants

A contended that it was Ong Sr's intention to transfer the lands to the defendants absolutely and not on trust. The defendants contended that their ownership of the lands is indefeasible pursuant to s 340 of the National Land Code.

B **[84]** According to the defendants, subsequent to the 1980 transfer they had, as the landowners, together with other co-owners, filed an application to subdivide Lot 8329 Mukim Tanjung Dua Belas Daerah Kuala Langat Selangor. The defendants and other co-owners entered into the subdivision agreement to subdivide Lot 8329 for the issuance of separate titles under respective names of the landowners including the defendants.

C

[85] There was no objection by Ong Sr to the subdivision agreement. He witnessed the execution of the subdivision agreement and his signature is found on every page of the document. The defendants made the point that they paid for all the costs incurred in connection with the application to subdivide Lot
D 8329. The defendants also say that they have dealt freely with the lands and the defendants have made income tax payments for the revenues generated from the lands.

E **[86]** The defendants contend that the plaintiffs' claim via Suit 497 is inconsistent with the claim filed by Ong Sr via Suit 31. It was emphasised that pursuant to the consent judgment, Ong Sr had relinquished his rights over the lands including the claim of a trust over the lands.

F **[87]** At any rate, the consent judgment does not reflect that the lands are being held by the defendants on trust for Ong Sr's sons or at all. In this regard, PW2 (Ong Sr's counsel) agreed when it was put to him, that based on the terms of the consent judgment in Suit 31, Ong Sr had relinquished all of his rights whatsoever over Parcel 2 and Parcel 3.

G

[88] It was argued for the defendants that the judge erred in law and/or fact in his failure to judicially appreciate and apply the principle relating to proof of the existence of a trust in *Low Tin Yong* which ought to have led to the conclusion that the defendants are not holding the lands on trust for Ong Sr's
H sons.

[89] Ong Sr in fact gave evidence and confirmed that the defendants paid income tax for the produce generated by Parcel 2 and Parcel 3.

I **[90]** Further, it is was argued that the judge erred in law and/or fact I in applying the case of *Wan Naimah* to the facts of the present case. In particular, it was emphasised that in *Wan Naimah,* there was documentary evidence to support the existence of the oral trust in addition to the words uttered by the settlor. But in the present case, there was no documentary evidence whatsoever

which could support the existence of a trust over the lands.

CRITICISM OF THE HIGH COURT'S JUDGMENT

[91] Counsel for the defendants' criticism of the findings of the judge were largely predicated on the testimony of Ong Sr although there was clear contradictory evidence and documentary evidence to negate the alleged trust. Counsel's criticism of the judge's findings may be summarised as follows.

[92] Essentially, it was contended on behalf of the defendants that the judge failed to consider that:

(a) Ong Sr failed to render a plausible explanation for the transfer of the lands to the defendants in 1980/1981 when he was the owner of the lands since 1971;

(b) according to the documentary evidence, on 19 June 1980, Ong Sr transferred part of his shares of the original land, for 'love and affection', to the defendants;

(c) Ong Sr failed to testify and explain why there was only a transfer of 20,000 shares each out of 176,204 shares to the land whilst he continued to retain the majority of the shares (96,204 shares) to the land;

(d) Ong Sr failed to explain why he retained the balance of 96,204 shares to the land if the lands were held on trust for his sons whereas the transfer to the defendants were only 20,000 shares each;

(e) Ong Sr failed to explain the clear contradiction as to his intention for the transfer of the lands. In Suit 31 he claimed that the lands were held in trust for him. On the other hand, he testified at trial in Suit 497 that the lands were held in trust for his sons;

(f) Ong Sr failed to clarify why he pleaded in Suit 31 that the lands were held in trust for him when he was the owner of the lands;

(g) Ong Sr failed to clarify the existence of the MOT which he had duly executed in 1980;

(h) Ong Sr failed to credibly explain why he did not object to the subdivision agreement which encompassed the lands and where it was expressly stated unequivocally that the defendants were the legal and beneficial owners of the lands;

(i) in this regard, Ong Sr witnessed the execution of the subdivision agreement and he did not object to the subdivision and the issuance of titles for parcels one, two and three to the defendants and OKY;

(j) Ong Sr failed to explain why he received 60% shares from the sale price

of Parcel 1 as part of the terms in the consent judgment and the balance 40% was to be distributed among his sons which inconsistent with the lands being held on trust for his sons;

(k) the judge uncritically accepted Ong Sr's evidence that the defendants agreed to divide the lands among his sons although the lands were part of the claim in Suit 31 but were omitted from the consent judgment;

(l) the judge accepted Ong Sr's evidence on land tax even though it was challenged by the CCTV recording and police reports that the documents were stolen from the defendants' office; and

(m) Ong Sr was not an independent witness as he has interest in the lands.

[93] In so far as Suit 31 is concerned, it was argued that the judge erred in law and/or in fact in failing to judicially appreciate and to take cognisance of the following in regard to the consent judgment:

(a) that Suit 31 is a claim for three parcels of land including the lands and the consent judgment discharged or extinguished all of Ong Sr's claim of any alleged trust in respect of the three parcels of land;

(b) thereafter, there exists no trust in respect of the lands;

(c) the judge accepted PW2's evidence relating to D1's declaration and undertaking to sell and distribute Parcels 2 and 3 equally amongst Ong Sr's sons although this was not reflected as part of the terms in the consent judgment; and

(d) the plaintiffs in Suit 497 were not parties to Suit 31 and were not privy to the mediation process before the recording of the consent judgment was recorded.

[94] According to the defendants, the judge erred in law and/or fact in deciding that the announcement with regard to the lands being held on trust by the defendants was done by relying on the testimony of the plaintiffs' witnesses during trial when the plaintiffs' witnesses were not independent witnesses and they have personal interests on the lands.

[95] It was submitted that the judge erred in law and/or fact in deciding that there was no contemporaneous evidence other than the testimony of Ong Sr when in fact DW1 confirmed that Ong Sr had instructed him to prepare the MOT to transfer the lands to the defendants in consideration of love and affection and that DW1 was in fact an independent witness who prepared the MOT.

[96] The defendants contend that they took control of the lands after the transfer, paid the quit rent and assessment on the lands every year and obtained a license from Malaysia Palm Oil Board to sell and remove oil palm bunches from the lands.

[97] The defendants contended that the judge erred in law and/or fact in concluding that it is not irregular for Ong Sr not to register the trust on the title to the lands based on the close relationship of Ong Sr's family although Ong Sr had given instruction to DW1 to prepare the MOT in writing.

[98] The defendants contend that the plaintiffs' claim is an afterthought and is inherently and fundamentally contrary to Ong Sr's claim in Suit 31.

[99] According to the defendants, the judge erred in law and/or fact in considering irrelevant considerations when arriving at his decision. In so far as irrelevant considerations are concerned, it was alleged that the judge relied on inadmissible evidence, to wit, the deliberations that took place during mediation before the JC in Suit 31.

[100] The judge allowed the plaintiffs' claim holding per his grounds of judgment ('GOJ') that:

(a) Parcels 2 and 3 are held on trust for all of the sons based on the negotiations that took place during the mediation in Suit 31 (paras 82, 89 and 90 of the GOJ); and

(b) Parcels 2 and 3 are held on trust for all of the sons based solely on Ong Sr 'contemporaneous evidence' during the trial (paras 72–73, 75, 78, 96–97 and 98 of the GOJ).

[101] The defendants maintain that the judge acted upon inadmissible evidence to come to his decision (paras 82 and 89–90). Counsel for the defendants argued that the evidence and admissions in a mediation are inadmissible. Reference was made to s 23 of the Evidence Act 1950 and s 16 of the Mediation Act 2012. Counsel also relied on *Sinclair v Roy* (1985) 20 DLR (4th) 748 (SC) which reads:

> The law has long excluded from evidence admissions by word or conduct made by parties during negotiations to settle litigation: *Pirie v Wyld* (1886) 11 OR 422. The privilege attaching to such communications belongs to both parties. The waiver of both parties is required if any communication is to be admissible: *Pais v Pais* [1970] 3 All ER 491.

[102] The next case that was referred to was *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 (SC), where it was held that inadmissible evidence remains inadmissible even when

no objection is taken. Counsel also read to us Sarkar, *Laws Of Evidence* (13th Ed) p 51 which reads:

> An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties ...

NO JUDICIAL APPRECIATION

[103] The defendants contend that in allowing the plaintiffs' claim, the judge relied entirely on Ong Sr's oral evidence (paras 72–73, 75, 78, 96–97 and 98 of the GOJ). In so far as that evidence relates to what transpired at the mediation of Suit 31, counsel for the defendants said that it was inadmissible. The remaining parts of Ong Sr's evidence are inconsistent with the contemporaneous documents. According to the defendants, the judge failed to test Ong Sr's oral evidence against contemporaneous documentary evidence and that failure to do so constituted an appealable error.

[104] Counsel referred to the well-known passage in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 where the Federal Court stated (p 234):

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence.
>
> For myself, I would with respect feel somewhat *safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.*
>
> *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case*. Plausibility should never be mistaken for veracity.
>
> It may be advantageous at this stage to recall the words of Lord Greene MR in *Yuill v Yuill* [1945] P 15 at pp 19–20:
>
> > We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the

> demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an infavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge.
>
> I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question.
>
> If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value. (Emphasis added.)

[105] In particular, it was emphasised that Ong Sr's evidence, which was that the lands were held on trust, ought to have been tested against the contemporaneous documentary evidence consisting of the following:

(a) the MOT dated 19 June 1980 which states in para (b) '*Sebagai balasan* — Love and affection towards my sons';

(b) the subdivision agreement dated 30 December 1998 which was witnessed by Ong Sr and resulted in the issuance of titles for Parcel 1, two and three to the defendants and OKY; and

(c) the terms of the consent judgment dated 23 July 2014 under which, 'plaintif dan defendan-defendan seterusnya bersetuju untuk selama-lamanya melepaskan dan mengetepikan setiap semua daripada apa-apa dan/atau semua tuntutan, tindakan, kausa tindakan, hak, guaman, prosiding, gantirugi, kos, caj, obligasi, liabiliti, penghakiman, perintah, tuntutan atau aduan selepas ini terhadap setiap orang melainkan dan kecuali apa-apa tindakan untuk menguatkuasakan terma-terma penghakiman persetujuan ini'

Translated into English, it reads, 'the plaintiff and the defendants subsequently agree to forever release and waive each and every one from any and/or all claims, actions, causes of action, rights, suits, proceedings, damages, costs, charges, obligations, liabilities, judgments, orders, claims or complaints subsequent to this against each person unless and except for any action to enforce the terms of this consent judgment'.

[106] Counsel for the defendants emphasised that the plaintiffs here were not parties to Suit 31 and that they cannot, therefore, take advantage of the consent judgment which is a contract between Ong Sr and the defendants.

[107] Counsel also criticise the judge's finding for having overlooked the following material which negates the existence of a trust:

A (a) Ong Sr testified as per his witness statement that *his portion of the land was to be held by him absolutely and that any transfer to his sons would only take place after his death*;

(b) *Ong Sr's declaration as to what is to happen after his death is a testamentary disposition* made in contravention of the Wills Act 1959 and *disposition is inconsistent with an inter vivos trust*;

(c) Ong Sr's evidence is inconsistent with the evidence of the independent witness in the present suit, DW1 (a subpoenaed witness) who prepared the MOT. *DW1 confirmed that Ong Sr did not instruct him that the transfer was subject to the alleged trust*;

(d) the fact that Ong Sr did not distribute the compensation received by him to all of his sons equally is consistent with there being no trust. Had there been a trust, there would have been equal distribution;

(e) the fact that Ong Sr did not ask Heyan to disgorge his share of the compensation for equal distribution among all the sons is inconsistent with there being a trust;

(f) the conduct of Ong Sr after the consent judgment was entered into is significant. He appropriated 60% of the purchase price of Parcel 1 for himself. Had there been a trust as alleged, he would have distributed it to all of his sons;

(g) the fact that Ong Sr remained silent for 33 years before he brought Suit 31 is a factor which must be considered when dealing with the probabilities of the case in the manner as asserted by the plaintiffs;

(h) according to counsel for the defendants, this is a point which was completely overlooked by the judge; and

(i) if as alleged by Ong Sr in his evidence in Suit 497, these were trust properties even at the time when the subdivision agreement was executed, it is highly improbable that he would have kept quiet for 33 years without protecting the plaintiffs' interests.

[108] Hence, counsel for the defendants said that Ong Sr's version that there was a trust goes against the probabilities of the case and his own conduct. Counsel for the defendants sought to bolster his argument by referring to the following parts of Ong Sr's testimony during the trial.

[109] Significantly, Ong Sr said that he had put the lands in the names of his four sons in 1980 as the other sons were all too young at that time.

[110] Ong Sr was specifically asked during cross-examination *whether he mentioned anything about a trust when the transfers were done*. Counsel for the

plaintiffs interjected when the topic of trust was raised. Nevertheless, counsel for the defendants pressed on. Ong Sr's answers were as follows:

> DC: Mr Ong, you are claiming that the 4 parcels of lands that you have distributed to your sons, Ong Kong Hian, Ong Kong Beng, Ong Kong Seong, Ong Kong Yew are trust properties. *Now my question to you is if it was meant to be a trust by you, why didn't you keep it in your name? Why did you have to transfer it to their names?*
>
> PW1: Yg Arif, because *I was getting old and their other brothers are still very young. So I was temporarily used their names.*
>
> DC: Mr Ong, I can understand if you put under the name of say, Ong Kong Hian or another son. *But why transfer to 4 people?*
>
> PW1: Because that time, *I was cheated by him. He asked me to sign. I just blindly sign. I am illiterate.*
>
> ...
>
> DC: Who is he?
>
> PW1: *The useless son. Ong Kong Beng.*
>
> DC: *At the time of signing, did you say that it was trust property?*
>
> PC3: My Lord, I think *the witness has said many times, he doesn't know the contents of what he was signing.*
>
> PW1: I was just asked to sign the documents blindly.
>
> DC: *I put it to you Mr Ong that you did not mention anything about the property being a trust property. Agree or not?*
>
> PW1: I disagree. I was cheated. (Emphasis and underlining added.)

[111] Counsel for the defendants made the following points in regards to Ong Sr's evidence. Ong Sr said that the lands were transferred to his four sons in 1980 because the other sons were all too young. Of course, when the transfer took place in 1980, the other sons were all minors. However, when the subdivision took place via the subdivision agreement dated 30 December 1998, the other sons were no longer minors and the lands could have been transferred to them. Ong Sr could not explain why it was necessary to transfer the land to the names of his four sons when one would have sufficed.

[112] Ong Sr also could not explain why there was no attempt to transfer the lands to all the sons equally as by then (1998), there was no necessity for the lands to be held in the names of the D1, D2 and OKY. Counsel also pointed out that although Ong Sr used the pejorative word 'cheated' to describe D1, the judge did not make any finding that Ong Sr was 'cheated' by D1.

[113] In relation to the subdivision agreement, Ong Sr said during cross-examination, 'I already quarrelled with 3 of them, how to raise my objection to them'.

[114] In response, counsel for the defendants pointed out that there was no evidence of any quarrel in 1998.

[115] Counsel also drew our attention to the fact that the subdivision agreement expressly referred to D1, D2 and OKY as the registered proprietors/landowners of the lands (Schedule A of the subdivision agreement dated 30 December 1998).

[116] If indeed Ong Sr had any objections or reservations when the subdivision agreement dated 30 December 1998 was executed, then it is odd and quite inconsistent for Ong Sr to have unconditionally signed each and every page of the document which expressly stated that the defendants and OKY were landowners of the land.

[117] Another point that was impressed upon us was the fact that under the subdivision agreement, the consultants who undertook the subdivision process were Lim Kooi Wah and Yap Say Sim ('consultants') and their professional charges were all paid by D1.

[118] Counsel for the defendants also highlighted that the plaintiffs themselves had no clue as to the existence of any alleged trust. This is seen when P3 (PW4) was cross-examined:

> DC: Yg Arif, I move on. I refer Mr KK to question no. 5. 'Who do you say that the lands have been wrongly claimed by Kong Yew, Kong Seong and Kong Beng?'. And your answer was that, 'It was because they each held the land as trustees.' How do you know that there is a trust on these lands?
>
> PW4: It is my father's practice, my family's practice all along, my father is the patriarch. He is always holding the ultimate authority in everything. It is a family practice.
>
> DC: But the trust, there is no written trust?
>
> PW4: I do not know.
>
> DC: You don't know whether there is a written trust?
>
> PW4: I do not know. Yes.
>
> DC: How old are you when the so-called trust was created?
>
> PW4: I do not know. Please tell me which document to go through?

[119] Next, we were referred to P1's (PW6) evidence. It may be recalled that P1 and the defendants are the sons of Ong Sr with their mother Mdm Ng.

[120] The notes of evidence show that when P1 (PW6) was questioned during cross-examination about the alleged trust over the lands, counsel for the plaintiffs interjected and said that *P1(PW6) should not be asked about the*

existence of the trust as that would be a question in regards to Ong Sr's 'state of mind':

DC: Put it to you, Mr Kong Leong, that Mr Kong Beng did not mention that the lands were held by Kong Beng, Kong Yew, and Kong Seong on their personal names on trust for other sons.

PW6: I disagree.

...

DC: That point in time, Randy, Kong Beng, Kong Seong, and Kong Yew helped your father to develop family fortunes including various companies.

PTW: Only three of them?

DC: Four. Randy, Kong Beng, Kong Seong, and Kong Yew.

PW6: Yes.

DC: And based on that reason, Mr Ong Ching Chee, your father transferred 80 acres of this land ...

PC1: *Yang Arif, objection to this question. Because he's asking the question of Mr. Ong Ching Chee. That question is reserved for Mr Ong Ching Chee. Not him. He's put in a position where he wants the first plaintiff to give evidence on Mr Ong Ching Chee's state of mind. It's not a proper question. He's only a Form 3 educated person. He's not psychiatrist*.

Judge: Yeah but counsel has yet to finish with the question. We'll see what the question is all about first.

DC: Mr Ong, you have mentioned just now that the relationship with Randy, Kong Beng, Kong Seong, and Kong Yew were cordial at that point of time. I put it to you because the relationship was cordial and Randy and all four sons were developing the business and family fortune, Mr Ong Ching Chee transferred 80 acres of his land to all four of your brothers.

PC1: Yang Arif, that's the objection.

Judge: Yeah because that's two portions to the question, you see. You know, the first part could be yes, the second part could ...

DC: Yang Arif, he already has mentioned that he ...

Judge: No, you established first because there ... you know ...

PC1: Yes, he is asking the state of mind of Mr Ong Ching Chee. You cannot ask a third party what Mr Ong Ching Chee's state of mind was. The reason behind the transfer is not proper.

...

DC: Can you confirm that these documents, confirmed that your father transferred 20 acres each for all four sons in 1980 out of love and affection?

PW6: I disagree, Yang Arif. Because at that time, I did not attain the age of adulthood. My father just used their name to register the land.

...

DC: Yang Arif, next question. At that point in time, in 1980, are you aware there was a trust on these 4 lands?

PW6: *I actually don't know what they were doing in the 1980's,* Yang Arif.

DC: *So you don't know about the trust in the 1980's? Okay.*

Judge: *I mean rightfully, the right person to answer these all is SP1.*

DC: Yes. We already posed, Yang Arif. Because *they are the ones that's claiming, so I need to put my case. Just to be at the safe side.*

Judge: And I think *you have already challenged SP1 on this right*? The right person to be challenged or the right person to be crossed has been crossed at land from 14(a).

DC: We did. But *I still need to prove because they are the claimers in this case*. Mr Ong Kong Leong, can you refer to page 327 of Bundle B(2).

Judge: Consent judgement.

DC: Mr Ong Kong Leong, do you have personal knowledge with regards to this consent judgement?

PW6: No.

...

DC: Since you know the contents of the consent judgement, can you now refer to your pleadings, Bundle A, paragraph 29 at page 26. According to your pleading at paragraph 29, you have mentioned that Mr Ong Ching Chee had waived his claim and his Parcel 2 and 3 when the defendants, in particular, the first defendant declared that he would distribute same parcels of land among all of the sons equally.

PW6: Yes.

DC: Okay. That is your case. I put it to you it is not reflected in the consent judgement. Can you confirm that?

PC1: Yang Arif, as you can see, paragraph 29 is in two parts. So you cannot say entire paragraph 29 is not reflected.

DC: The second paragraph of the paragraph 29, My Lord. That in particular the first defendant declared that he would distribute the same parcel of land among all the sons equally. Can you confirm that it is not reflected in the consent judgement on Page 327 to 331?

PC3: My Lord, I don't want to interrupt and I really hate interrupting a cross-examination but isn't that obviously a submission point? Like, the witness doesn't know that ... in fact I think it is a very legal point. I think my learned friend can take it out on submission rather than pose it to the witness. It's a bit unfair.

DC: Yang Arif, it is not a legal point, Yang Arif, It [sic] is a fact that Ong Ching Chee agreed to waive that Kong Beng wants to ... there's nothing legal, Yang Arif.

Judge: Yeah, the consent judgement is there. Paragraph 29 is there. So you submit.

DC2: Yang Arif, it's pleaded. If you don't put it today, then we are not doing our ...

PC3: No, I think ...

DC2: Forgive me for the obvious.

...

DC: *I also put to you, Mr Kong Leong, That Kong Beng and Kong Seong did not sell the land because there is no trust on the said land on behalf of all the sons.*

PC1: That's a submission, Yang Arif.

Judge: *Submission.*

PC1: *Submission.* (Emphasis added.)

[121] Datuk Lau Sek Chee (DW1) told the court that Ong Sr approached him in 1980 to handle the transfer of the land into the names of his four sons. He said that Ong Sr did not mention anything about trust. His testimony as regards Ong Sr's instructions was as follows:

DW1: In 1980, somewhere in the month of June, Mr. Ong Ching Chee came to my office in Banting and approached me to do a transfer over a piece of land under his name. He also instructed me to work out the shares to be given to the 4 children.

...

DW1: Mr. Ong Ching Chee intend to transfer a portion of the land that is about 80 acres of his entitlement to the 4 children. Each is about 20 acres leaving the balance of 107 acres. He told me to reserve for another 5 children where he didn't disclose the names to me.

DECISION OF THE HIGH COURT

[122] The judge's findings and conclusion that there was a trust are to be gathered from the following paragraphs of the grounds of judgment ('GOJ'):

Penerimaan keterangan saksi-saksi

[71] Defendan-Defendan tidak mempertikaikan bahawa pemilik asal tanah tersebut sebelum dipindahmilik kepada mereka adalah bapa mereka Ong Ching Chee (SP).

[72] Ong Ching Chee sebagai saksi utama dan terpenting Plaintif menafikan dakwaan Defendan 1 dan Defendan 2 bahawa tanah-tanah tersebut telah diberikan oleh Ong Ching Chee sebagai hadiah dari seorang bapa kepada mereka sebagai anak atas usaha mereka membangunkan dan memajukan ekonomi keluarga besar Ong Ching Chee. Menurut SP1 adalah menjadi hasrat dan amalan beliau untuk membahagikan harta beliau secara sama rata diantara anak-anak lelaki beliau dan Defendan-Defendan telah diberitahu tentang niat dan hasrat beliau itu ketika pindahmilik dilakukan.

[73] Menurut Ong Ching Chee (SP1) lagi tanah-tanah tersebut didaftarkan atas nama Ong Kuang Heyan, Defendan 1, Defendan 2 dan Ong Kwong Yew memandangkan mereka adalah anak-anak lelakj beliau yang telah dewasa dan anak-anak yang lain (Plaintif-Plaintif 1, 3 dan 4) masih belum cukup umur pada masa itu. Menurut SP1, Ong Kuang Heyan, Defendan 1, Defendan 2 dan Ong Kwong Yew tahu bahawa mereka memegang tanah-tanah tersebut atas amanah bagi adik-adik mereka yang lain.

[74] Peguam terpelajar Defendan merujuk kepada kes *Low Tin Yong @ Low Yong*

Tian v Low Yong Thuan dimana Mahkamah telah menolak tuntutan Plaintif dan berhujah bahawa oleh kerana persamaan fakta kes tersebut dengan kes kita ini maka tuntutan/dakwaan Plaintif di sini hendaklah ditolak. Dengan hormatnya saya tidak dapat menerima hujahan peguam trpelajar [sic] Defendan tersebut. Adalah tidak dipetikaikan [sic] terdapatnya beberapa fakta yang serupa/sama (*similar*) antara kes *Low Tin Yong* itu dan kes kita ini tetapi, pada hemat saya, terdapat perbezaan fakta material yang amat ketara antara kes tersebut dengan kes kita ini.

[75] Dalam kes *Low Tin Yong* saksi yang dikatakan memberi amanah lisan kepada Defendan iaitu, bapa kepada Plaintif dan Defendan tidak hadir memberikan keterangan kerana beliau telah meninggal dunia dan keterangan mengenainya diberikan oleh saksi yang mendakwa diberitahu tentang amanah tersebut. Sebaliknya, dalam kes kita ini pemberi amanah tersebut (Ong Ching Chee/SP1) hadir sendiri dan memberikan keterangan. Dalam keterangan bersumpah beliau di Mahkamah ini, pemberi amanah (Ong Ching Chee/SP1) sendiri menyatakan dengan jelas tentang amanah yang diberikan kepada Defendan-Defendan dan Ong Kwong Yew. Ong Ching Chee (SP1) telah disoal balas dengan keras dan panjang lebar oleh peguam Defendan. Namun, beliau mengekalkan keterangan beliau berhubung amanah tersebut. Saya mendapati keterangan beliau utuh dan gagal dipatahkan oleh pihak Defendan.

[76] Fakta bahawa tiada sebarang memorandum amanah secara bertulis dikemukakan oleh Ong Ching Chee adalah tidak dipertikaikan. *Plaintif mendakwa hebahan amanah tersebut dibuat secara lisan oleh Ong Ching Chee kepada Defendan-Defendan dan Ong Kwong Yew.* Defendan berhujah Ong Ching Chee gagal mengemukakan saksi bagi menyokong keterangan beliau bahawa bagi tanah-tanah [sic] tersebut sememangnya ada hebahan amanah secara lisan oleh beliau kepada Defendan-Defendan dan Ong Kwong Yew. Peguam Defendan berhujah, atas kegagalan mengemukakan saksi tersebut, Plaintif telah gagal membuktikan dakwaan mereka melepasi keraguan munasabah.

[77] Berhubung ketiadaan amanah bertulis, undang-undang mengenainya adalah jelas. Ketiadaan amanah secara bertulis tidak bermakna satu amanah tidak wujud. Hebahan amanah tidak perlu dibuat secara bertulis.

Dalam kes *Wan Naimah v Wan Mohammad Nawawai* [1974] 1 MLJ 41; [1974] 1 LNS 164 Mahkamah Persekutuan dalam membuat keputusan menerimapakai keputusan dalam kes *Grant v Grant* dan menyatakan seperti berikut:

> The law is that a declaration of trust may be made informally, provided the words used are clear and unequivocal. As was stated by Romilly MR in *Grant v Grant (1865) 55 ER 776*, words declaring trust need not be in writing ...

[78] Berhubung ketiadaan saksi menyokong hebahan amanah tersebut, dengan hormatnya saya juga tidak dapat menerima hujahan peguam Defendan bahawa tiada saksi atau keterangan terus hebahan amanah oleh Ong Ching Chee kepada Defendan-Defendan telah meranapkan kes Plaintif. *Saya mendapati keterangan Ong Ching Chee disokong oleh isteri beliau (Chong Chit Eng/SP3), anak beliau SP6/Plaintif 1 dan peguam beliau/SP2. Saya mendapati keterangan mereka secara keseluruhannya adalah konsisten/selari dengan keterangan Ong Ching Chee.* Saya mendapati keterangan mereka merupakan keterangan ikut keadaan yang menyokong keterangan Ong Ching Chee bahawa tanah-tanah tersebut dipegang

oleh Defendan-Defendan dan Ong Kwong Yew atas amanah yang diberikan oleh Ong Ching Chee.

[79] Dalam kes kita ini, untuk menyokong keterangan/kes mereka Defendan bergantung kepada keterangan SD1 (Datuk Lau Sek Chee) yang memberikan keterangan bahawa beliau mengenali Ong Ching Chee (SP1) sejak tahun 1969 dan mereka berkawan rapat. Menurut Defendan-Defendan keterangan SD1 menyokong keterangan mereka bahawa tanah tersebut telah dipindahmilik secara mutlak kepada mereka. Berhubung tanah dalam kes ini (Parcel 2 dan 3) pada tahun 1980, menurut SD1, Ong Ching Chee (SP1) meminta tolong beliau semasa SP1 ingin bahagikan tanah beliau kepada beliau sendiri (SP1) dan anak-anak lelaki beliau iaitu Ong Kong Beng, Ong Kong Kuan, Ong Kong Seong dan Ong Kwong Yee seluas 20 ekar seorang. Menurut SD1, SP1 tidak pernah memberitahu beliau yang tanah tersebut akan dipegang atas amanah oleh mereka bagi anak-anak yang lain.

[80] Dengan hormatnya saya tidak dapat menerima hujahan peguam terpelajar Defendan bahawa SD1 menyokong keterangan Defendan-Defendan. Ini adalah kerana semasa disoal balas, SD1 bersetuju dengan saranan peguam Plaintif bahawa perkara berhubung amanah (trust) adalah perkara peribadi diantara ahli keluaraga [sic] dan tiada sebab untuk SP1 memberitahu beliau tentang kewujudan amanah (rujuk Nota Keterangan — Jilid 1 di muka surat 33 dan 34).

[81] Berdasarkan jawapan/keterangan SD1 tersebut saya mendapati keterangan SD1 tidak membuktikan bahawa keterangan pihak Plaintif khasnya keterangan SP1 tentang kewujudan amanah bagi tanah-tanah yang didaftarkan di atas nama Plaintif tidak benar.

Pada hemat saya, *jika benar sekalipun keterangan SD1 bahawa Ong Ching Chee (SP1) tidak pernah memberitahu beliau tentang amanah bagi tanah-tanah tersebut, kegagalan untuk memberitahu beliau tentang perkara tersebut tidak membuktikan amanah tersebut tidak wujud*. Mahkamah perlu melihat dan menimbang keterangan lain berkaitan perkara tersebut.

[82] Sehubungan itu, *saya mendapati keterangan SP1 dan SP2 bahawa Defendan 1 dan Defendan 2 telah berjanji untuk membahagikan tanah Parcel 2 dan 3 kepada adik-adik lelaki mereka yang lain semasa perbincangan dalam kamar Hakim di Mahkamah Shah Alam pada 23.7.2014 adalah relevan*.

Bayaran cukai-cukai tanah dan taksiran bagi tanah-tanah tersebut

[83] Menurut SP1 selepas tanah-tanah tersebut dipindah, segala bayaran cukai tanah dan taksiran bagi tanah tersebut masih dibayar oleh beliau, membuktikan bahawa beliau tidak pernah melepaskan tanah tersebut kepada Defendan-Defendan.

[84] Berhubung cukai tanah dan taksiran tanah-tananah [sic] Parcel 2 dan Parcel 3 Defendan-Defendan mendakwa, selepas tanah-tanah tersebut didaftarkan atas nama mereka, mereka sendiri telah membayar cukai bagi tanah-tanah itu tetapi resit bayaran telah diambil (dicuri) oleh SP1 dan Plaintif 3 daripada tempat simpanan dipejabat mereka. Sebagai bukti Defendan-Defendan mengemukakan gambar CCTV (still photopraph [sic]) kejadian pecah pejabat yang didakwa dilakukan oleh SP1 dan Plaintif 3 tersebut (Ikatan Dokumen Tambahan Defendan-Defendan —

A 'F' muka surat 1–6 dirujuk). Defendan-Defendan juga merujuk kepada laporan-laporan polis mereka berkaitan kejadian tersebut. (Ikatan 'F' mukasurat 9–15 dirujuk).

[85] Setelah diteliti bukti yang dirujuk oleh Defendan-Defendan tersebut (gambar dan laporan polis), dengan hormatnya saya mendapati Defendan-Defendan gagal
B membuktikan bahawa kejadian tersebut melibatkan resit-resit cukai tanah bagi Parcel 2 atau 3. Jika ada 'kecurian' dokumen, berdasarkan laporan polis, tiada satu pun melibatkan resit cukai tanah Parcel 2 dan 3.

Oleh itu saya mendapati keterangan SP1 bahawa beliau terus membayar cukai tanah/taksiran bagi tanah-tanah tersebut tidak tercabar dan menyokong keterangan
C beliau bahawa bayaran cukai tanah/taksiran oleh beliau menunjukkan beliau tidak pernah berniat untuk melepaskan tanah-tanah tersebut secara mutlak hanya kepada Defendan 1 dan 2.

Pungutan Hasil tanaman sawit tanah tersebut

D [86] Menurut SP1, selepas tanah-tanah didaftarkan atas nama Ong Kuang Heyan, Defendan 1, Defendan 2 dan Ong Kwong Yew, semua hasil tanaman sawit tanah-tanah tersebut terus dipungut dan digunakan oleh beliau dan bukan anak-anak beliau. Fakta/keterangan ini tidak pernah disangkal/dicabar oleh Defendan-Defendan. Saya mendapati SP1 jika benar tanah-tanah (Parcel 1, 2 dan
E 3) itu milik mutlak mereka, tindakan mereka tidak memunggut [sic] hasil tanaman sawit dan tidak menghalang tindakan Plaintif adalah amat meragukan. Seseorang yang munasabah dalam keadaan sedemikian pasti akan mengambil tindakan menuntut hak keatas hasil tanaman tanah milik beliau. Oleh itu saya mendapati, keterangan pihak Plaintif berhubung perkara ini adalah lebih munasabah. Fakta tersebut saya mendapati memihak kepada Plaintif.

F

Penghakiman Persetujuan bertarikh 27.3.2014 — Ong Wong Yew bersetuju menjual tanah beliau

[87] Menurut SP1, Defendan 1, 2 dan Ong Kwong Yew tahu pada ketika itu bahawa mereka hanya pemegang amanah bagi adik-adik mereka yang lain. Atas
G sebab itulah Ong Kwong Yew bersetuju untuk tanah beliau dijual dan hasil jualan diagihkan kepada adik-adik lelaki yang lain. Menurut SP1 tiada sebab untuk Ong Kwong Yew bersetuju melepaskan tanah tersebut jika ianya merupakan tanah beliau secara mutlak.

[88] Sebaliknya, Defendan-Defendan mendakwa Terma 7 perintah Penghakiman
H Persetujuan membuktikan tanah-tanah tersebut adalah milik mutlak Defendan-Defendan.

[89] Berhubung perkara tersebut, saksi Plaintif SP2 sebagai peguam SP1 dalam perbincangan/rundingan penyelesaian diantara pihak-pihak terlibat dalam kamar Hakim, Defendan 1 mencadangkan supaya tanah Ong Kwong Yew (Parcel 1) dijual
I dan hasil jualan dibahagikan. Menurut SP2, Defendan 1 juga menyatakan dia akan bahagikan 2 tanah atas nama beliau (Parcel 2) dan Defendan 2 (Parcel 3) diantara adik-adik lelaki yang lain. Defendan tidak memanggil peguam yang mewakili mereka dan Ong Kwong Yee untuk menyangkal keterangan SP2 tersebut.

[90] Berdasarkan keterangan saksi-saksi Plaintif dan Defendan berhubung perbincangan dan persetujuan yang dicapai saya mendapati keterangan pihak Plaintif khususnya keterangan SP2 adalah lebih munasabah. Oleh itu saya menerima keterangan beliau.

Wang pampasan pengambilan tanah oleh Kerajaan

[91] Menurut SP1 keseluruhan wang pampasan yang diterima dari Kerajaan bagi pengambilan tanah beliau dan Ong Kuang Chee telah beliau gunakan untuk membeli ladang/tanah di Sabah/syarikat Chendawan Sdn Bhd. Menurut tanah tersebut milik Ong Kuang Heyan, sudah tentu wang pampasan bagi tanah beliau tersebut akan digunakan oleh beliau sendiri. Keterangan pihak Plaintif khususnya SP1 berhubung perkara tersebut tidak dipertikai oleh Defendan-Defendan.

[92] Defendan-Defendan mendakwa tindakan Ong Kuang Heyan yang tidak membahagikan wang pampasan tanah mereka yang diambilalih oleh Kerajaan membuktikan bahawa tanah tersebut sememangnya dibahagikan secara mutlak kepada mereka. Namun, dakwaan Defendan-Defendan tersebut disangkal oleh Plaintif 2 yang menyatakan bahawa wang pampasan yang diterima telah digunakan bukan secara peribadi oleh Ong Kuang Heyan tetapi digunakan untuk membeli syarikat/ladang di Sabah.

[93] Dalam kes *Wan Naimah v Wan Mohammad Nawawai* [supra] di muka surat 5 Mahkamah memutuskan bahawa:

> The law is that a declaration of trust may be made informally, provided the words used are clear and unequivocal ...
>
> ... They must be clear, unequivocal and irrevocable, but it is not necessary [sic] to use any technical words ... Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust think that it is also sufficient for the purpose of shewing that the trust has been created if he afterwards states that he has so created the trust though there was no witness except the donee present at the time the trust was created. (Penekanan ditambah.)

[94] Saya mendapati fakta dan keadaan kes kita memenuhi keadaan yang dinyatakan/diputuskan oleh Mahkamah Persekutuan sepertimana yang ditekankan diatas. Dalam kes kita, dari keterangan secara menyeluruh saya merumuskan bahawa SP1 (Ong Ching Chee) adalah seorang ketua keluarga (patriarch [sic]) yang rapat dengan setiap ahli keluarga beliau dan seorang yang sebaik mungkin cuba bertindak adil berhubung pengagihan harta beliau. Sebelum pertikaian timbul antara SP1 dan Defendan-Defendan dan Ong Kwong Yew pada tahun 2013 beliau membahagikan saham-saham syarikat beliau kepada anak-anak beliau secara percuma/tanpa meminta bayaran. Defendan adalah anak yang diberi kepercayaan penuh oleh SP1 bagi mengurus syarikat-syarikat beliau. Fakta tersebut tidak pernah dipertikaikan oleh Defendan-Defendan.

[95] Mengambil kira sejarah hubungan kekeluargaan yang begitu rapat antara SP1 dengan anak-anak beliau, pada hemat saya adalah tidak pelik untuk SP1 tidak mendaftarkan amanah secara bertulis pada geran Hakmilik tanah (Parcel 2 dan 3) berkenaan. Sebaliknya, pada hemat saya sekiranya Ong Ching Chee menyediakan

satu) memorandum amanah bertulis kepada Defendan-Defendan dan Ong Kwong Yew pada masa tersebut, ianya adalah suatu yang pelik.

[96] Dalam kes kita, tiada saksi semasa hebahan amanah kepada Defendan-Defendan dan Ong Kwong Yew dipanggil. Ong Kuang Heyan yang turut sama terlibat tidak dapat dipanggil kerana telah meninggal dunia. Oleh itu, walaupun keterangan semasa (*contemporaneous evidence*) yang ada hanyalah keterangan Ong Ching Chee, berdasarkan keterangan kes ini secara menyeluruh dan keputusan kes *Wan Naimah* diperenggan [76] di atas saya menerima versi Ong Chng [sic] Chee sebagai keterangan yang benar. Saya mendapati keterangan pihak Plaintif adalah lebih munasabah berbanding keterangan Defendan-Defendan.

[97] Setelah meneliti keterangan dan keperibadian (*demeanour and character*) SP1 sepanjang perbicaraan saya mendapati tiada sebab keterangan SP1 tidak boleh diterima sebagai benar. (Emphasis added.)

AFFIRMATION OF THE TRUST BY D1 (SUIT 31)

[123] It was submitted for the plaintiffs that based on what took place during the mediation in Suit 31, there was an affirmation of the trust by D1. In Suit 31, D1 had made a declaration that he would divide the lands with the other sons. This declaration was made in the presence of Ong Sr as well as counsel for both Ong Sr and the defendants. This declaration was a clear affirmation of the family arrangement and trust. Ong Sr testified in the present suit as follows:

The trial for the suit was scheduled on 23.7.2013. Before the trial, I reminded Kong Beng that the portions of the Bukit Changgang Land I purchased were intended to be distributed among my sons. Therefore, it was wrong for Kong Beng, Kong Seong and Kwong Yew to claim the land for themselves. After many discussions with the judge and Kong Beng, Kong Seang and Kwong Yew and their lawyers together with my lawyer, I agreed not to pursue the 2 parcels of land registered under the respective names of Kong Beng and Kong Seang upon the understanding that they would distribute those 2 parcels of land equally among their brothers.

[124] Counsel for Ong Sr in Suit 31, Mr Lee See Loon (PW2) testified as follows:

I re-called Mr. Ong Ching Chee suggested that the piece of land (about 20 acres or 8 hectares) in the name of Kong Seong be sold at market value and also said that he is prepared to distribute the proceeds of sale amongst his 10 sons in equal share with a portion to himself. Mr. Ong Ching Chee proposed the same because at that time that piece of land in the name of Kong Seong was free of encumbrances.

Again Kong Beng, Kong Seong and Kwong Yew did not agree.

I re-called that at this juncture after discussing amongst the defendants' themselves Kong Beng agree to put up the smallest piece of land (about 15 acres or 6 hectares) in the name of Kwong Yew be sold at market value and that the proceeds of sale be distributed. Kong Beng also said that he will split the 2 other pieces of land in Bukit Changgang (in the names of Kong Seong and him) among the brothers.

[125] According to the plaintiffs, the declaration (which was made in court) was that D1 will share the lands in Bukit Changgang and this was also repeated by D1 to the P1. It was accordingly argued that such affirmations are consistent with and supported the plaintiffs' case, that is, the understanding and intention all along was that D1 and D2 did not have true and absolute ownership over the lands and they had never intended to keep the lands for themselves and that the lands formed part of a trust intended for the benefit for all the sons of Ong Sr.

[126] Further, such a declaration fortifies P1's position that D1 had at all times intended to share the assets with him and it also gives rise to a legitimate claim for P2 and P4 given that they are the estate of a deceased son (Heyan) and sons of Ong Sr, and such intention to share would similarly apply to them as well.

[127] It is also highlighted that in the High Court, the aforesaid statements of fact were not challenged by the defendants' counsel. *It was never put to Ong Sr, and/or PW2, and/or P1 that such a declaration had never been made by D1.* The absence of any challenge is treated as an admission of fact and in this regard, the plaintiffs referred to *Sarkar on Evidence* (15th Ed) Vol 2 at pp 2178–2179 wherein it is provided as follows:

> *Thus if a witness speaks about a conversation, the cross examining lawyer must indicate by his examination how much he disputes, and to suggest his own version. If he asks no questions, he will be taken to accept the witness's account.*
>
> ...
>
> *Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed.*

[128] It was thus argued for the plaintiffs that in light of the documentary evidence as well as the oral evidence of witnesses as well as the unchallenged statements of fact there can be no doubt and the judge was eminently correct in holding that the lands were held on trust for, inter alios, the plaintiffs in this case.

[129] In answer to the defendants' pleaded case, counsel for the plaintiffs submitted as follows. Counsel first referred to the defendants' stance that:

(a) Ong Sr had transferred the said lands to them on the basis of love and affection;

(b) the love and affection purportedly arose after the defendants together with Ong Kwong Yew through their hard work and industry and

A through the incorporation of two of the family companies generated fame and fortune for the benefit of the company and by extension Ong Sr; and

(c) post transfer, the defendants had purportedly treated the said lands as their own and they had paid all quit rent and assessment charges in respect of the company as well as income tax accruing from the produce generated from the land and that they had used the lands to obtain loans.

C **[130]** Reference was also made to the defendants' contention that:

(a) they had been working for Ong Sr;

(b) they, in particular D1, had incorporated the first two family companies; and

D

(c) that Ong Sr had transferred the lands in Bukit Changgang to them as a token of appreciation given that they had brought wealth and fame to the companies after incorporating the same.

E **[131]** Counsel for the plaintiffs said that these were bare assertions and were found wanting by the High Court when tested against the contemporary documentary evidence. According to the plaintiffs:

(a) the said lands were registered in the defendants' names in 1981;

F (b) D1 had only begun working for Ong Sr in 1979;

(c) the first family company was registered in 1979 and the second was incorporated in 1980; and

G (d) corporate and financial documents unequivocally show that Ong Ching Chee Realty Sdn Bhd, the first family company to be incorporated, did not trade between 1980 to 1981.

[132] It was contended that the defendants (and OKY) could not produce any H document to prove that the family companies had in fact generated wealth and fame between 1979 and 1981 and that by virtue of the same Ong Sr had allegedly rewarded them with the said lands. OKY having been confronted with the evidence had no choice but to admit that the answer to question 6 in their witness statements (both defendants included) were *untrue.*

I

[133] According to the plaintiffs, there is no evidence before the court to suggest or support the defendants' suggestion that the lands were given to them as a reward for helping the companies prosper in financial terms or in terms of fame. Counsel said that not only is there an absence of evidence to support such

a suggestion, OKY in the course of the trial also admitted that the statement or answer to question six in his witness statement is untrue. A

[134] Therefore, the plaintiffs maintain that the lands were never transferred on a basis of love and affection and the lands were never meant as a reward for a job well done. Such a suggestion was pure conjecture on the part of the defendants and rightly rejected by the judge. B

[135] In amplification, it was submitted that the defendants had never used the lands for personal benefit or gain. Only one land (Parcel 1) was ever used as collateral for a loan and that loan was taken for the benefit of Elegant Palms Sdn Bhd, a family company. This fact serves to illustrate that the defendants had not and did not consider the lands their own. C

[136] In so far as the allegation that the defendants had exerted their alleged proprietary interests by paying the quit rent and assessment charges for the said lands, there was no evidence whatsoever to support the defendants' said position. D

[137] Counsel for the plaintiffs also pointed out that D1 had tried to suggest that he had paid income tax due on the produce generated by the land. However, D1 was again unable to produce any evidence to show that he had paid the sums purported to be taxed from his personal account. D2 offered no assistance to the court. D2 just claimed that he did not know anything about the payments which were handled by D1. OKY (DW4), the defendants' witness, was even worse. He referred the court to quit rent and assessment receipts. What those documents succeeded in showing was that Ong Sr had paid for the quit rent and assessment rates. It was pointed out to OKY that the receipts he referred to were for years 2010 to 2013 and in his very own evidence in chief he had admitted that Ong Sr had paid for these expenses. E F G

[138] The defendants had been shown to be witnesses of poor credibility. Both the defendants and OKY relied on an identical witness statement. According to the plaintiffs, both the defendants and OKY were caught out on the same lie. H

OUR DECISION

[139] We shall start with the issue of admissibility of D1's declaration during mediation. I

[140] In this regard, the defendants' complaint before us was that the judge had relied on inadmissible evidence, namely D1's declaration during mediation in Suit 31 that he would sell Parcel 2 and Parcel 3 and distribute the

proceeds amongst the male heirs. Ong Sr said that he would not have agreed to the consent judgment but for D1's said declaration. Counsel for the defendants relied on s 23 of the Evidence Act 1950. He also said that s 16 of the Mediation Act 2012 did not apply.

[141] Section 23 of the Evidence Act 1950 reads as follows:

> Section 23. Admissions in civil cases when relevant
>
> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.
>
> Explanation — Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 126.

[142] And s 16 of the Mediation Act 2012 reads as:

> Section 16. Privilege
>
> (1) Any mediation communication is privileged and is not subject to discovery or be admissible in evidence in any proceedings.
>
> (2) Notwithstanding subsection (1), the mediation communication is not privileged if —
>
> (a) the privilege is expressly waived in writing by the parties, the mediator and the non-party;
>
> (b) it is a public document by virtue of the Evidence Act 1950 [Act 56];
>
> (c) it is a threat to inflict bodily injury or commit a crime;
>
> (d) it is used or intended to be used to plan a crime, attempt to commit or commit a crime, or to conceal a crime or criminal activity or an ongoing crime or ongoing criminal activity;
>
> (e) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or
>
> (f) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, non-party, or representative of a party based on their conduct during any mediation session.

[143] In our view, the issue of inadmissibility of evidence does not even arise. This is because of what took place in the High Court and in particular, the way the parties prepared the case for trial. Here, it is pertinent to note that parties had agreed as part of pre-trial case management that the *deliberations during mediation was an issue to be determined at the trial*. The judge was asked to determine whether D1 had in fact made such a declaration. The issue to be tried reads as follows:

iii. Sama ada Defendan Pertama dan Defendan Kedua mengumumkan dan/atau memberi gambaran bahawa beliau akan membahagikan Parcel 2 dan Parcel 3 kepada semua anak-anak lelaki Ong Ching Chee secara sama rata *semasa proses mediasi* untuk kes 23NCVC-31-11/2013?

[144] In regards to the issue of the judge's reliance on so-called inadmissible evidence, it is relevant to note that Ong Sr and PW2 had testified (without objection) as to what had transpired at the mediation. And it is significant that during cross-examination of Ong Sr, *counsel for the defendants had asked questions about what was said during the mediation*. Counsel put a particular factual proposition to Ong Sr. This is how Ong Sr was cross-examined.

DC: Coming back to the consent judgement, I am putting it to you Mr Ong, the fact that Kong Beng and Kong Seong will sell the land and later on it will be divided equally among the sons was important term proposed by you in the mediation. Can you confirm that?

PW1: Yes.

DC: I also put to you the consent judgement doesn't reflect his proposal.

PW1: Yg Arif, that's why I say I have been cheated.

DC: Cheated by who?

PW1: Dia tipu sama saya. Saya beli 500 acres dia satu sen pun tak ada keluar. Lagi mahu Ong Kong Hian dan Ong Ching Chee punya wang pergi beli Cendawan ah?

DC: Can I ask one more question. Did you complain to your lawyer, Lee Sin Loong, that your intention was not reflected in the consent judgement?

PW1: Yes, I did complain to my lawyer. But I don't know what happened he did not take action.

[145] As mentioned earlier, Ong Sr and PW2 testified and spoke at length in regards to what D1 had said during deliberations. There was no objection taken during the trial when all of these were introduced as part of the evidence.

[146] In our view, given the fact that parties had agreed to have the deliberation during mediation as one of the issues to be tried and since counsel for the defendants had brought up the issue of the matters deliberated during mediation, it is clear that the defendants had expressly (via the issue to be tried) or implicitly (by not objecting and by asking questions) 'waived' any privilege that may have attached to the deliberations that took place during the mediation in Suit 31.

[147] Ultimately, the judge made a finding that D1 did in fact make the declaration during the mediation of Suit 31 that he would ensure that Parcels 2 and 3 would be sold and the proceeds shared equally between the male heirs of Ong Sr. Looking at the evidence, we do not see any reason to doubt the correctness of the judge's finding in this regard.

[148] No doubt, the suggestion may have emanated from Ong Sr during the 'horse-trading' in the mediation. But that is not important. What is material is whether D1 had unequivocally articulated that Parcels 2 and 3 would be sold and the proceeds shared equally between Ong Sr's ten sons.

[149] Thus, looking at all the circumstances, it is in our view, more probable than not, that D1 did utter the declaration during the mediation. To that extent, the judge's finding is unimpeachable. The plaintiffs contend that D1's said utterance and declaration bolsters the existence of a prior trust which flowed from the 1980 transfer.

[150] We move on to the 1980 transfer. In so far as the 1980 transfer was concerned, Ong Sr said that there was no trust deed. He said that it was his 'intention' that the land be shared amongst the ten sons. His testimony was as follows:

> DC: Mr Ong, you kept saying that the lands which were transferred in 1980 were trust properties. Was there a deed of trust prepared by you?
>
> PW1: Yg Arif, I do not have any trust deed for this trust that I mentioned about. At that time, I trusted him.
>
> DC: I put it to you Mr Ong, that the 4 pieces of land in 1980 was transferred to Ong Kong Hian, Ong Kong Beng, Ong Kong Seong, Ong Kong Yew pursuant to their efforts in bringing up the company at that time. Because of that, you transferred 80 acres to them on love and affection. Do you agree with my suggestion?
>
> PW1: I disagree. *My intention* is for my lands to be shared among my 10 sons.

[151] On the subdivision agreement, Ong Sr said that he 'objected'. His testimony during cross-examination was as follows:

> DC: Can I now refer you to pages 148 to 154, bundle B1? Mr Ong, this is an agreement between the landowners to subdivide their lands. Can you confirm?
>
> PW1: Yes.
>
> DC: And you became a witness to this agreement? Can you confirm that?
>
> PW1: Yes.
>
> DC: And the agreement is dated 30.12.1998?
>
> PW1: Yes.
>
> DC: Did you object to this document at that point in time?
>
> PW1: Yg Arif, I was asked to sign this agreement. I do not know the contents. It was in I did object but I was informed that it was temporary.
>
> DC: How did you object?
>
> PW1: Yg Arif, in fact I did object to this as I was the one who paid for the property. I objected to it orally.

DC: The parties to this document are Ng Koh Guan, Ong Kong Beng, Ong Kong Seong, Ong Kong Yew, Lee Boh Thiam, Lee Boh Seng at page 151. There are various parties involved in this subdivision exercise. Who did you object to?

PW1: *I expressed my objection to Lim Kooi Wah.*

DC: Are you calling him as a witness to support your contention?

PC3: Yg Arif, he is not a litigant. He is a witness. I think my learned friend needs to re-phrase that question.

DC: Nevermind Yg Arif. I can put it in the submission. Apart from your oral objection to Lim Kooi Wah, *you did not make any serious objection to Kong Beng, Kong Seong, Kong Yew. Can you confirm that?*

PW1: *I already quarrelled with 3 of them. How to raise my objection to them*?

[152] On the question of Ong Sr's 'intention' in regards to the 1980 transfer of the land to his four sons, his answer during cross-examination were as follows:

DC: Mr Ong, you are claiming that the 4 parcels of lands that you have distributed to your sons, Ong Kong Hian, Ong Kong Beng, Ong Kong Seong, Ong Kong Yew are trust properties. Now my question to you is if it was meant to be a trust by you, why didn't you keep it in your name? Why did you have to transfer it to their names?

PW1: Yg Arif, because *I was getting old and their other brothers are still very young.* So I was temporarily used their names.

DC: Mr Ong, I can understand if you put under the name of say, Ong Kong Hian or another son. But why transfer to 4 people?

PW1: Because that time, I was cheated by him. He asked me to sign. I just blindly sign. I am illiterate.

DC: Who is he?

PW1: The useless son. Ong Kong Beng. (Emphasis added.)

[153] On the important question of whether he made any declaration at the time of 1980 transfer that the land was trust property, it appears that Ong Sr was prevented from giving an answer because counsel had interjected. At any rate, Ong Sr seemed content to say that he signed 'blindly' and was 'cheated'. He said nothing about uttering any words to the defendants to suggest that there was a trust in relation to the 1980 transfer. He just said he was illiterate, he signed blindly and was cheated by his 'useless son', D1:

DC: At the time of signing, did you say that it was trust property?

PC3: My Lord, I think the witness has said many times, he doesn't know the contents of what he was signing.

PW1: I was just asked to sign the documents blindly.

DC: I put it to you Mr Ong that you did not mention anything about the property being a trust property. Agree or not?

A PW1: I disagree. I was cheated.

[154] We turn now to the issue which goes to the heart of the case. The law in respect of how a trust is constituted in Malaysia is well established. The elements which are necessary to constitute a trust are, certainty of intention, certainty of object and certainty of subject matter. The trust need not be in writing and does not have to be formal. This position is well reflected in the Federal Court decision in *Wan Naimah*. Here, it is an undisputed fact that there is no document eg a trust deed or other legal document or written statement that can be relied upon to prove the existence of a trust over the lands.

[155] Further, the so-called trust was not registered pursuant to s 344 of the National Land Code. No doubt, there is no legal requirement that a trust should be in writing (see: *Grant v Grant*). Be that as it may, the law nevertheless requires clear evidence that the elements for a valid trust exist, namely, certainty of words, certainty of subject and certainty of object.

[156] We were reminded that this was a traditional Chinese family set-up and the relationship had for the most period been good or at the very least cordial. Hence, there was no necessity for any written agreements or formal arrangements especially between a father and his sons.

[157] This is plainly a case which turned on finding of facts and the question of which set of facts presented by the two opposing parties the judge chose to believe. It was submitted that this naturally turned on an assessment of the demeanour and credibility of witnesses. No doubt, a trial judge is entitled to believe the version of one side as being more credible than the other and to make his findings accordingly. In this case, on the crucial question of the trust over the lands, the judge believed the version of the plaintiffs and not that of the defendants. It was submitted for the plaintiffs that the defendants have not demonstrated that the findings of facts, by the judge were 'plainly wrong'. Counsel referred to several cases in respect of the 'plainly wrong' test which is now the established test set by the Federal Court on reversing findings of facts by a trial judge.

[158] It is of course true that it is only in the rarest of circumstances that an appellate court would interfere with findings of fact particularly findings which are based on the credibility of the witnesses. In this regard, we are acutely mindful of the pronouncement by the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC) (*Ng Hoo Kui*) as to the test for appellate interference.

[159] In *Ng Hoo Kui,* the Federal Court reviewed the relevant principles as established by previous cases in Malaysia, the United Kingdom and Singapore. The principle is that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong. The Federal Court explained that the 'plainly wrong' test operated on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records. According to the Federal Court, a decision of a trial judge could be said to be plainly wrong if the decision is predicated on a critical finding of fact which has no basis in the evidence or there was a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence.

[160] It is quite clear from our reading of the GOJ, that the trial judge believed and relied heavily on the evidence of Ong Sr who had testified that the lands were bought by him and *it was his intention that the said lands be shared by all his ten sons.* But, it need be emphasised that *mere intention* alone will not suffice to create a valid trust (see: *Grant v Grant*). The judge also relied on PW2's evidence. But that is only in relation to what transpired during the mediation in Suit 31. The judge also relied on PW3's evidence. She is Ong Sr's second wife and someone who clearly had an interest in the outcome of the case.

[161] Finally, the judge also relied on the evidence of PW6 (P1). But P1 acknowledged during cross-examination that he had no knowledge of any trust over the land.

[162] P1 merely said that it was always Ong Sr's intention that the assets of the family companies, its shares and lands were all to be shared equally by his sons.

[163] In our view, the evidence that was presented at the trial of Suit 497 as a whole, was equivocal and did not establish that the defendants held the lands in question on trust for the ten sons of Ong Sr, especially in light of the contemporaneous documents, including the subdivision agreement, the consent judgment dated 23 July 2014 in Suit 31 and Ong Sr's conduct, and in particular his answers on various aspects of the claim that there was a trust over the land.

[164] We agree with the judge when he said that Ong Sr was the main witness for the plaintiffs in relation to the existence of a trust. But the judge appears to have uncritically accepted Ong Sr's evidence in material respects in reaching his conclusion that the lands were held by the defendants in trust. The judge said that Ong Sr was severely cross-examined and was unshaken.

[165] Specifically, the judge concluded that there was a declaration of trust. He used the specific words, 'hebahan amanah'. In this regard, he said:

> [96] Dalam kes kita, *tiada saksi semasa hebahan amanah kepada Defendan-Defendan dan Ong Kwong Yew dipanggil.* Ong Kuang Heyan yang turut sama terlibat tidak dapat dipanggil kerana telah meninggal dunia. Oleh itu, walaupun keterangan semasa (contemporaneous evidence) yang ada hanyalah keterangan Ong Ching Chee, berdasarkan keterangan kes ini secara menyeluruh dan keputusan kes *Wan Naimah* di perenggan [76] d atas saya menerima versi Ong Chng [sic] Chee sebagai keterangan yang benar. Saya mendapati keterangan pihak Plaintif adalah lebih munasabah berbanding keterangan Defendan-Defendan. (Emphasis added.)

[166] The judge concluded that there was a declaration of trust, albeit not in writing. He said at para 78:

> *... Saya mendapati keterangan Ong Ching Chee disokong oleh isteri beliau (Chong Chit Eng/SP3), anak beliau SP6/Plaintif 1 dan peguam beliau/SP2. Saya mendapati keterangan mereka secara keseluruhannya adalah konsisten/selari dengan keterangan Ong Ching Chee ... (Emphasis added.)*

[167] But the judge overlooked or glossed over the fact that the plaintiffs presented no clear, convincing or corroborative evidence whatsoever in regards to the alleged trust over the lands. Indeed, it is obvious from a reading of the notes of evidence that counsel for the defendants was not even allowed to put a question on the existence of the so-called trust. Apparently, the 'trust' issue was not a matter for cross-examination and was instead a point for submission. The notes of evidence (cross-examination of P1–PW6) show that such questions were met with interjections from plaintiffs' counsel as may be seen from following exchange during the trial:

> DC: I *also put to you, Mr Kong Leong*, That Kong Beng and Kong Seong did not sell the land *because there is no trust on the said land on behalf of all the sons*.
>
> PC1: That's a submission, Yang Arif.
>
> Judge: Submission.
>
> PC1: Submission. (Emphasis added.)

[168] We observe that there was a pattern of timely interjections particularly when inconvenient questions were put to the witnesses. Counsel's interjections were unhelpful and were disruptive to the flow of the cross-examination. It appeared to be an attempt to insulate the witness from his inability to answer critical questions touching upon the existence of the alleged trust.

[169] In the above example counsel for the defendants had tried to put the question that Parcels 2 and 3 were not sold because there was no trust over these lands. But counsel for the plaintiff interjected to say that, that *is a matter for submission.* The judge agreed. We are perplexed as to how cross-examination on

an issue of fact (whether there was a trust) which goes to the heart of the plaintiffs' case can be objected to as being a matter for submission. In our view, this in itself is a misdirection by the judge as the whole case was anchored on the issue of trust. Here, the cross-examiner was attempting to put to P1, that D1 and D2 did not sell Parcel 2 and Parcel 3 pursuant to the consent judgment, as there was, as far as they were concerned, no trust over these lands. The witness was however not allowed to answer because of counsel's interjection.

[170] We also find that the judge should have, but did not, take into account and/or consider the fact that Ong Sr filed Suit 338 against OKY claiming that the latter had sold Parcel 1 at an undervalue. Suit 338 was filed on *22 June 2015* whereas *Suit 497* was filed on *14 October 2014*. *Ong Sr did not include D1 and D2 in Suit 338*. The judge did not consider the fact that Ong Sr did not instruct his solicitor to send a letter of demand to D1 and D2 in respect of their failure to fulfil the undertaking or promise that was given during the mediation process that they would sell Parcel 2 and Parcel 3 and distribute the proceeds of sale equally amongst Ong Sr's ten sons.

[171] And, pertinently, if the defendants or D1 had reneged on the declaration that was made during mediation in Suit 31, then it is curious that Ong Sr took no steps to set aside the consent judgment. It is obvious enough from a plain reading of the terms of the consent judgment that Ong Sr would face immense difficulty in setting aside the consent judgment if he were to assert a claim over Parcels 2 and 3 as he had (as confirmed by his lawyer, PW2) unequivocally and irrevocably relinquished all claims over these lands.

[172] It is important to emphasise that this was a case where the factual matrix straddled a period of more than 30 years. There were various events that took place and which afforded legitimate inferences to be drawn as to the existence of the so-called trust.

[173] In our view, the judge looked at the evidence selectively and did not undertake a critical and comprehensive evaluation and assessment, particularly of Ong Sr's version as to why the original land was transferred to the four sons (1980 transfer) (see: Q14 of Ong Sr's witness statement), namely that the land was transferred to the names of the four sons in 1980, as the other sons were not of the age of majority.

[174] He also said he was old. It is pertinent to point out that in 1980, Ong Sr who was born in 1927 was about 53 years old.

[175] In regards to the other children not being of the age of majority, a careful examination of the evidence would have revealed that P1 who was born on 29 September 1963 attained the age of majority (18 years) on 29 September 1981.

P3 who was born on 6 April 1971 attained the age of majority on 6 April 1989. Finally, P4 who was born on 18 January 1974 attained the age of majority on 18 January 1992.

[176] Thus, by the time the subdivision took place per the subdivision agreement (December 1998), the other three sons were all of the age of majority. There was accordingly no longer any impediment to the lands being transferred to the names of the other three sons. However, Ong Sr did not (and probably could not) explain why there was no attempt to transfer the land into the names of the three other sons after they had attained the age of majority.

[177] In this regard, with reference to the subdivision in 1998, an important question that the judge should have asked himself was — if the land was held in trust, why did Ong Sr go along with or condone or acquiesce to the subdivision process which took place in December 1998? It is relevant to ask, why didn't Ong Sr register his protest to the description of D1, D2 and OKY as landowners in the subdivision agreement and knowing fully well that D1 and D2 would be getting individual titles to the lands in their own name? Ong Sr told the court that he did not object to the subdivision because he had quarrelled with the defendants. But there was no evidence of any quarrel between Ong Sr and the defendants. But at the same time, he said that he had verbally informed Lim Kooi Wah (the consultant) of his objection.

[178] The question is — why would Ong Sr share his domestic (family related) grievance with an outsider? In any event, the said Lim Kooi Wah was not called to testify. Indeed, we think that by reason of the failure to call Lim Kooi Wah, an adverse inference (s 114(g) of the Evidence Act 1950) should be made against Ong Sr and therefore as against the plaintiffs as well.

[179] Thus, if Lim Kooi Wah had been called to testify, he would probably have denied that Ong Sr had informed him of any purported objection. In the final analysis, there is but one conclusion — Ong Sr never raised any objection to the subdivision agreement. The so-called objection was an afterthought and designed to mitigate the effect of Ong Sr's acquiescence to the subdivision agreement which expressly described D1 and D2 as landowners.

[180] At any rate, the plaintiffs offered no explanation for the payments that were made by D1 to the consultants in respect of the subdivision. If these were trust properties, then payment to the consultants should have been made by Ong Sr or by the family companies. But there was no such payment by Ong Sr, or by any of the family companies or any reimbursement by any of these parties to D1. This demonstrates quite convincingly that the defendants, or rather D1 paid the consultant from his own pocket because the lands belong to the defendants and were not trust property.

[181] At the same time, Ong Sr said he could not object because he had quarrelled with the defendants. The 'quarrel' theory was not even put to the defendants during cross-examination. In truth there was no quarrel in December 1998.

[182] The family dispute erupted very much later (2013). Indeed, even the basis for Ong Sr's pejorative description of D1 that he was 'cheated' by the 'useless son' was not put to D1 during cross-examination. Ong tried to portray himself as illiterate, was cheated and blindly signed documents. But there was no finding that Ong Sr was 'cheated'.

[183] And as far as Ong Sr's status as an illiterate is concerned, we think that it was just a convenient position to take as there was just too much for Ong Sr to explain. The so-called illiteracy status was to insulate him from the consequences of executing various documents which he later sought to disavow. Ong Sr was not an ordinary person who knew nothing about commerce and business. It was quite to the contrary.

[184] The notes of evidence also reveal that Ong Sr had even told the trial court that he had served as a member of the jury. Assuming that to be true, is it even conceivable that an illiterate person would have been selected for jury duty in a Malaysian court?

[185] Further, Ong Sr was a shareholder, director and was running the business of several companies. He would have had to sign copious statutory and legal documents qua director of these companies.

[186] It is of course true that an illiterate person can be a director and shareholder of a private limited company but in the present circumstances, Ong Sr's plea that 'I am illiterate' and 'I was cheated', was probably thrown in for the purposes of disavowing and distancing himself from the 1980 transfer and the subdivision agreement.

[187] At any rate, it is clear from the GOJ that the judge had not considered these matters in the overall assessment of Ong Sr's evidence. The judge placed too much emphasis on the plausibility of Ong Sr's evidence when what he ought to have done was to test Ong Sr's testimony against the contemporaneous documents, the conduct of the parties and overall probabilities of the entire case.

[188] No doubt the defendants and OKY may not have been the best of witnesses and may well have skirted around the truth in respect of their so-called contribution to the companies and in regards to the payment of quit rent etc.

[189] The judge was probably right in disbelieving them on their evidence on these aspects of the case. But the question is whether that of itself suffices to establish the alleged trust over the land. Put in another way — even if the defendants were not to be believed in regards to their so-called contribution to the family companies, does that prove the 1980 transfer was pursuant to a trust? We do not think so. The inability of the defendants to explain why the original land was transferred to the four sons in 1980 does not automatically translate into a transfer based on a trust.

[190] Here, it has to be borne in mind that it was the plaintiffs' burden to prove that Ong Sr had uttered clear, unequivocal and irrevocable words to the defendants for the purposes of creating a trust on the land. The relevant legal question is — did Ong Sr at any time, during the 1980 transfer, utter clear, unequivocal and irrevocable words to the defendants necessary for the purposes of creating a trust on the original land?

[191] From the evidence, instead of establishing clear, unequivocal and irrevocable words, what we have is Ong Sr saying that 'so long as I was alive, the lands would be held by me absolutely and any transfers to my sons would only have taken place after my death'. Counsel for the defendants rightly describes this as a testamentary disposition which does not fulfil the requirements of s 5 of the Wills Act 1959 and is in any event, inconsistent with the creation of an inter vivos trust. Consequently, it is clear that there was no certainty of words and no declaration of a trust.

[192] At para 72 of the GOJ, the judge said:

> [72] Ong Ching Chee sebagai saksi utama dan terpenting Plaintif menafikan dakwaan Defendan 1 dan Defendan 2 bahawa tanah-tanah tersebut telah diberikan oleh Ong Ching Chee sebagai hadiah dari seorang bapa kepada mereka sebagai anak atas usaha mereka membangunkan dan memajukan ekonomi keluarga besar Ong Ching Chee. Menurut SP1 adalah menjadi Hasrat dan amalan beliau untuk membahagikan harta beliau secara sama rata diantara anak-anak lelaki beliau dan Defendan-Defendan telah diberitahu tentang niat dan Hasrat beliau itu ketika pindahmilik dilakukan.

[193] But having trawled through the copious notes of evidence, we could not see any evidence to back up the judge's finding that Ong Sr had told the defendants when the land was transferred (1980) that it was his intention that the land was to be held on trust for the benefit of all his sons. In the present case, the judge ought to have strictly followed the principle that was alluded to by the Court of Appeal in *Low Tin Yong* at paras 59–60:

> [59] In determining this crucial issue of whether or not a trust subsisted, the learned judge should have considered and applied the *dicta* in the Federal Court case of *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182; [1978]

1 LNS 244 at p 193:

> ... *Evidence contemporaneous with the transaction, or shortly before and shortly afterwards, must be seen to be much more important than the evidence of events after the death of the person who was alleged to have constituted himself the trustee.*
>
> ...
>
> [60] In the instant case, the learned trial judge failed to consider adequately or at all, the contemporaneous conduct of the parties, the lack of any written documentation to support the existence of a trust, as well as the evidence of salient witnesses.
>
> Instead, she relied on the oral testimony of the respondent and his immediate family, without weighing up their self-interest in the matter. Their evidence moreover was not consonant with the contemporaneous evidence. (Emphasis added.)

[194] The defendants maintained that they freely dealt with the lands and even paid income tax for the produce generated by the lands. But they could not produce evidence of income tax payments. Counsel for the plaintiffs latched on to the defendants inability to prove that they had made income tax payments. In this regard, our attention was drawn to that part of Ong Sr's evidence where *he admitted that the defendants paid income tax on the produce which was generated by the lands*. This was overlooked by the judge. The evidence as to Ong Sr's admission is seen in the following part of the notes of evidence:

> DC: Did you pay income tax for the proceeds you made from the land?
>
> PW1: Yg Arif, I did not pay but they pay.
>
> DC: Who are they?
>
> PW1: Ong Kong Beng, Ong Kong Seong Ong Kong Yew.

[195] In our view, the evidence presented at the trial of Suit 497 did not establish, on a balance of probabilities, that the defendants held the lands on trust for the ten sons of Ong Sr. We are impelled to the conclusion that there is merit in the defendants' criticism of the judge's approach and reasoning. We are convinced that the judge's approach was erroneous, the reasoning flawed and the conclusions wrong.

[196] This is because it has been convincingly demonstrated that the judge failed to deal convincingly or at all with the following critical points:

(a) Ong Sr failure to explain the delay in the assertion (after 33 years) that the lands were held in trust for him (Suit 31);

(b) Ong Sr failure to explain the inconsistency in asserting in Suit 31 that the lands were held in trust for him as the absolute beneficial owner,

whereas in Suit 497, the plaintiffs (as well Ong Sr) maintained that the lands were held by the defendants in trust for all the sons of Ong Sr;

(c) the judge's failure to consider Ong Sr's conduct vis a vis Suit 338 in that if the defendants did renege on their undertaking as pleaded by the plaintiffs in Suit 497, then, it is Ong Sr who should be prosecuting a claim against D1 and D2 and not the plaintiffs. But Ong Sr was quite content not to take any action against the defendants for not selling Parcels 2 and 3 as per the discussion or declaration made by D1 during the mediation;

(d) Ong Sr failure to take any steps to set aside the consent judgment;

(e) Ong Sr's evidence that so long as he was alive, the lands were to be held by him absolutely and after his death, they are to be distributed equally amongst his sons, which is akin to a testamentary disposition contrary to s 5 of the Wills Act 1959 and inconsistent with an inter vivos trust;

(f) Ong Sr's conduct in witnessing the subdivision agreement dated 30 December 1998 and thereby acquiescing to the contents therein notwithstanding that it states that D1 and D2 are the landowners of the lands which are the subject matter of the subdivision;

(g) Ong Sr's allegation that he raised an objection to the subdivision agreement by verbally informing the consultant, Lim Kooi Wah, without calling the said consultant to testify;

(h) Ong Sr's conduct in claiming that he could not communicate his objections to the subdivision agreement to D1, D2 and OKY as he had 'quarrelled' with the defendants when there was no evidence of any such quarrel;

(i) the conduct of D1 in making all the payments to the consultants vis a vis the subdivision agreement and the lack of evidence of any payment or reimbursement made by Ong Sr or by the family companies;

(j) the fact that by the terms of the consent judgment at Suit 31, Ong Sr had unequivocally and irrevocably relinquished whatever rights, interest or claims he claimed to have had in regard to Parcels 2 and 3. PW2 agreed that this was the effect of the consent judgment;

(k) the fact that Ong Sr's justification for transferring the original land (1980 transfer) to the four sons (including D1 and D2) because the others were too young at that time did not make any sense, as the others had over the years attained the age of majority by the time the original land was sub-divided in December 1998, and no attempt was made to transfer any part of the original lands to the other sons;

(l) Ong Sr could not explain why it was necessary to transfer the original land (1980 transfer) into the names of four sons when one would have sufficed;

(m) Ong Sr did not provide any evidence that he was purportedly 'cheated' by D1;

(n) Ong Sr admitted that the defendants paid income tax on the produce which was generated by the lands. If the lands were trust property, then income tax should have been paid by Ong Sr or by the family companies. But that did not happen. This is conduct which demonstrates that the lands belonged to the defendants as legal and beneficial owners;

(o) no trust was registered over the lands pursuant to s 344 of the National Land Code; and

(p) Ong Sr's conduct in asking for and accepting 60% of the proceeds of sale of Parcel 1 (per the consent judgment) shows that Parcel 1 and by extension Parcels 2 and 3 were not held in trust.

[197] For the reasons as stated and elaborated above, we are of the view that there was a demonstrable misunderstanding of relevant evidence and a demonstrable failure to consider relevant evidence. There was a 'lack of judicial appreciation of evidence' which rendered the decision of the judge plainly wrong.

[198] In the result, if the judge had addressed his mind to the several matters alluded to above, he would have reached the conclusion that the conduct of Ong Sr punctuated through a long passage of time of approximately 33 years manifested to the contrary of Ong Sr's contention that there existed a trust over the lands. This is a case where the judge had reached a conclusion which no reasonable judge could have reached. See: *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 (CA) (*MMC*) (per Nallini JCA (as she then was) p 437).

[199] In the ultimate, and herein lies the rub of the matter, the evidence when examined simply do not disclose any declaration of trust by Ong Sr when the lands were transferred to and registered in the names of the defendants. To the contrary, the acts and omissions of Ong Sr both express and by inference, over a substantial period of time, pointed to the very opposite — that the lands were, and were meant to be, gifted absolutely to the defendants. In *MMC*, Nallini JCA reiterated at para 17 that the trial judge is required to undertake a full evaluation of the evidence and issues placed before the court and 'a first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bald findings of

fact are made with no reasoning or evidence to substantiate such findings'.

[200] In the case before us the judge ignored vital evidence (see para 196) including in particular, the subdivision agreement, the position that Ong Sr took in Suit 31 and the terms of the consent judgment. In our view, there was a failure to appreciate relevant and compelling evidence touching upon the veracity and plausibility of the assertion that there was trust over the disputed lands.

[201] We are impelled to the view that based on the evidence and materials placed before the court at trial, no reasonable tribunal would have concluded that the plaintiffs had discharged their burden of proving that a valid trust existed over Parcels 2 and 3.

[202] Hence, appellate intervention is warranted in all the circumstances. In reaching our conclusion, we were mindful of the fact that the judge had the audio/visual advantage which this court is deprived of. We are however satisfied that there were fundamental lapses in the judicial evaluative process which vitiated the judge's decision that there was trust over the disputed lands. Therefore, the judge's decision that there was a trust over the disputed lands was in the circumstances, plainly wrong.

RESULT

[203] The appeal is therefore allowed and the HC order dated 26 August 2016 is set aside. Consequently, the plaintiffs' claim (per the re-amended statement of claim dated 19 February 2016) is dismissed. As the appeal has been allowed, it follows that there should be an order of restitution in respect of the monies that were paid to the plaintiffs pursuant to the HC order.

[204] The jurisdiction of the court to order restitution upon a reversal of the High Court's order/judgment was lucidly explained by Justice Sharma's decision in *Malacca Malay Guru-Guru Co-Operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors* [1971] 1 MLJ 107 (HC) where he said at p 109:

> The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it. (See *Jai Berhm v Kedar Nath Marwari* 49 IA 351; AIR 1922 PC 269, *Prayag Narain v Kamekhea* 36 IA 97.)
>
> In *Lala Bhagwan Das v Lala Kishen Das* [1953] SCR 559 the Supreme Court of India put the matter thus:
>
> > On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the court to enforce that obligation unless it is shown that restitution would be purely contrary to the real justice of the case.

> The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. In order to do this the court may make any order including an order for the refund of costs or the payment of interest, damages, compensation or *mesne* profits as may properly be consequential on such variation or reversal of the order.

[205] For completeness, we should mention that the abovementioned principle was endorsed by the Federal Court in the case of *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 AMR 3921 (FC) (at p 723).

[206] We therefore order that the monies that were paid to the plaintiffs pursuant to the HC order, including all damages and costs, be repaid to the defendants. As for costs, we think that a sum of *RM80,000 as costs here and below* (subject to allocator) would be fair and reasonable. We so order.

Order accordingly.

Reported by Ashok Kumar